UNITED STATES CODE ANNOTATED

Title 27

Intoxicating Liquors

[redacted]

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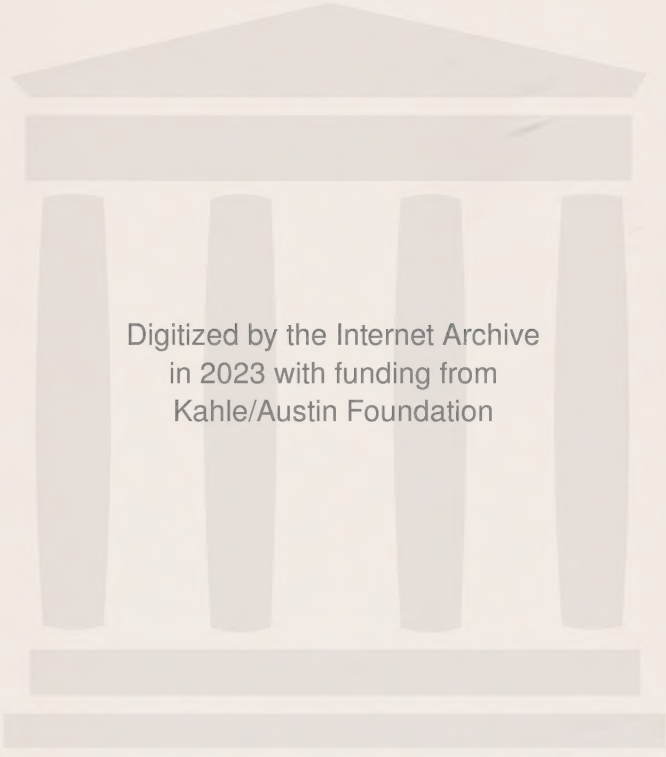
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UNITED STATES CODE ANNOTATED

The Code of the Laws of the United States in force December 7, 1925, as Enacted by Congress June 28 and Approved June 30, 1926

Annotated from all the Cases Construing these Laws

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Title 27

Intoxicating Liquors

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St. Paul, Minn.
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1927

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PREFACE

TO

THE CODE OF THE LAWS OF THE UNITED STATES

This Code is the official restatement in convenient form of the general and permanent laws of the United States in force December 7, 1925, now scattered in 25 volumes—i. e., the Revised Statutes of 1878, and volumes 20 to 43, inclusive, of the Statutes at Large. No new law is enacted and no law repealed. It is prima facie the law. It is presumed to be the law. The presumption is rebuttable by production of prior unrepealed Acts of Congress at variance with the Code. Because of such possibility of error in the Code and of appeal to the Revised Statutes and Statutes at Large, a table of statutes repealed prior to December 7, 1925, is published herein together with the Articles of Confederation; The Declaration of Independence; Ordinance of 1787; the Constitution with amendments and index; tables of cross references to the Revised Statutes, the Statutes at Large, the United States Compiled Statutes, Annotated, of the West Publishing Co., and the Federal Statutes, Annotated, of the Edward Thompson Co.; an appendix with the general and permanent laws of the first session of the Sixty-ninth Congress; and finally an exhaustive index of the laws in the Code and appendix.

The first official codification of the general and permanent laws of the United States was made in 1874 and followed by a perfected edition in 1878. From 1897 to 1907 a commission was engaged in an effort to codify the great mass of accumulating legislation. The work of the commission involved an expenditure of over $300,000, but was never carried to completion. More recently the task of codification was undertaken by the late Hon. Edward C. Little as chairman of the Committee on the Revision of the Laws of the House of Representatives, who labored indefatigably from 1919 to the day of his death, June 24, 1924. The volumes which represented the result of his labors were embodied in bills which passed the House of Representatives in three successive Congresses unanimously but failed of action in the Senate.

The Code now set forth has resulted from the hearty cooperation of the Committee of the House of Representatives on the Revision of the Laws, and the Select Committee of the United States Senate consisting of Richard P. Ernst, chairman, George Wharton Pepper, and William Cabell Bruce. Under the auspices of the committees of the House and the Senate the actual work of assembling and classifying

the mass of material has been done by the West Publishing Co. and the Edward Thompson Co. These two houses have subordinated their private interests to the public good and have produced a result which would have been impossible without them. Acknowledgment of valuable assistance is given to W. H. McClenon, of the Legislative Reference Division of the Library of Congress, and to the law officers and other representatives of the several departments, bureaus, and commissions of the Government. Appreciation is also expressed of the interest in the work taken by the Committee on the Revision of the Federal Statutes of the American Bar Association.

Scrutiny of this Code is invited. Constructive criticism is solicited. It is the ambition of the Committee on the Revision of the Laws of the House of Representatives gradually to perfect the Code by correcting errors, eliminating obsolete matter, and restating the law with logical completeness and with precision, brevity, and uniformity of expression.

Address criticisms to Chairman of the Committee on the Revision of the Laws of the House of Representatives, Washington, D. C.

ROY G. FITZGERALD, *Chairman.*

Washington, June 30, 1926.

FOREWORD

THE publishers of this annotated edition of the Code of the Laws of the United States are rendering a notable service to the public in general and to the legal profession in particular.

Cooperation between the publishers and the Committees of the Senate and House on Revision of the Laws made possible the preparation of the Code adopted by the Sixty-ninth Congress. The Code thus adopted is evidence of the law. After the correction of errors, inevitable in a work of this sort, the Code will no doubt be enacted into law and all the other legislation of Congress will be repealed. Meanwhile it is of the highest importance to bring together for ready reference all the legislation embodied in the Code and the mass of judicial decisions which have construed the legislation. This can best be done by distributing the Code through a series of volumes of convenient size, each volume containing a designated portion of the legislative text together with annotations of relevant judicial decisions. This task of division and addition has now been completed in a satisfactory way. The volume embodying legislation on a given subject can readily be taken from the library shelf or from the book-rack beside the desk and carried to court or wherever it is intended to be consulted. Mahomet need no longer seek the mountain. The mountain has distributed itself into foothills and all of them have come to him.

As a member of the Senate Committee on the Revision of Laws I have had something to do with the evolution of the Code. Members of the two Committees can appreciate, as few others can do, the magnitude of the problem of which the Code is a solution. While the annotations and other auxiliary matter account for the number of volumes in the present edition, it is well to remember that the Code itself, as issued from the Government Printing Office, is included within the limits of a single volume. That all the permanent and general legislation of a century and a half can be thus compressed is a fact to be borne in mind whenever it is charged that there has been an unreasonable multiplication of federal statutes. In spite of the popular impression to the contrary, I believe that a critical study of this body of law will disclose the Congress of the United States as the most conservative of the important legislatures of the world. I further believe that no set of volumes in the law library will be found more serviceable than those now made available for general use.

GEORGE WHARTON PEPPER.

Washington, D. C., December 16, 1926.

PUBLISHERS' PREFACE

THE "Code of the Laws of the United States," as passed by Congress in June, 1926, incorporates all of the laws of a general and permanent nature in force at the beginning of that session, that is, December 7, 1925.

Congress, in preparing the Code, had in mind the necessity for an arrangement of the laws which was convenient and accessible, and one which would also make provision for future growth.

To this end all of the existing laws are logically arranged under fifty titles. Many of these titles are subdivided into chapters, and lesser subdivisions wherever the matter lends itself to such arrangement.

The Code does not contain consecutive section numbers from beginning to end, as was the case in the Revised Statutes of 1878. The fifty titles comprising the Code are independently numbered, each title beginning with section 1. Gaps are left in the numbering, between the chapters and other subdivisions, so that new and amendatory acts may be inserted with due regard to their relation to the basic matter contained in the Code.

The purpose of this Annotated Edition is to add to this framework of the law, as represented by the text of the statutes, the constructions which the courts have placed upon these laws; for, as the Supreme Court has well said, "after a statute has been settled by judicial construction, the construction becomes * * * as much a part of the statute as the text itself." Without these constructions no man can know the law.

In addition, there has been supplied a great mass of historical data, showing the antecedents of the particular acts or sections, with comments on the sources and the character of the changes.

Many other editorial features have been supplied, which are designed to make the text and annotations more accessible or useful, not the least of which are Reference Tables showing where the laws have previously been placed in the Revised Statutes of 1878, the subsequent Statutes at Large, the Federal Statutes Annotated and the United States Compiled Statutes Annotated.

The entire work is supplemented by a most exhaustive and comprehensive index.

The editorial staffs of the two publishers, with the knowledge and experience gained over a long period of time in preparing annotated editions of the United States laws, have brought to this enterprise the background, the ability, and the judgment necessary to produce the character of work which the importance of the task demands.

In so far as the size of the title and the volume of annotations will permit, each title of the laws is comprised within a single volume of this set. It is felt that the advantages accruing from such a method

of publication will materially increase the value of the set for reference purposes.

A great step forward has been taken in the adoption of the plan for adding later laws and annotations to each title, through Supplementary Parts, which fit into the pocket at the back of each book, thus doing away with the necessity for publishing later matter in supplemental volumes, with all of their unavoidable inconveniences. These pocket parts are to be issued annually and cumulated from year to year.

Supplementing these pocket parts are Quarterly Pamphlets, which will contain all the laws and annotations which become available after the publication of the latest pocket part. These also are cumulated from quarter to quarter, the final cumulation supplied each year being in the form of pocket parts to be slipped into the backs of each volume of the set.

W. P. Co.

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THE ANNOTATIONS

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THE TITLES OF THE U. S. CODE AND USCA ARE ARRANGED AND NUMBERED AS FOLLOWS

1. General Provisions.
2. The Congress.
3. The President.
4. Flag and Seal, Seat of Government, and the States.
5. Executive Departments and Government Officers and Employees.
6. Official and Penal Bonds.
7. Agriculture.
8. Aliens and Citizenship.
9. Arbitration.
10. Army.
11. Bankruptcy.
12. Banks and Banking.
13. Census.
14. Coast Guard.
15. Commerce and Trade.
16. Conservation.
17. Copyrights.
18. Criminal Code and Criminal Procedure.
19. Customs Duties.
20. Education.
21. Food and Drugs.
22. Foreign Relations and Intercourse.
23. Highways.
24. Hospitals, Asylums, and Cemeteries.
25. Indians.
26. Internal Revenue.
27. Intoxicating Liquors.
28. Judicial Code and Judiciary.
29. Labor.
30. Mineral Lands and Mining.
31. Money and Finance.
32. National Guard.
33. Navigation and Navigable Waters.
34. Navy.
35. Patents.
36. Patriotic Societies and Observances.
37. Pay and Allowances (Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service).
38. Pensions, Bonuses, and Veterans' Relief.
39. The Postal Service.
40. Public Buildings, Property, and Works.
41. Public Contracts.
42. The Public Health.
43. Public Lands.
44. Public Printing and Documents.
45. Railroads.
46. Shipping.
47. Telegraphs, Telephones, and Radiotelegraphs.
48. Territories and Insular Possessions.
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UNITED STATES CODE ANNOTATED

*

THE CODE OF THE LAWS OF THE UNITED STATES OF AMERICA

TITLE 27

INTOXICATING LIQUORS

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Cross-References

Instruction as to effect of alcoholic drinks; see Title 20, Education.
Taxation; see chapters 5 and 6 of Title 26, Internal Revenue.

CHAPTER 1.—GENERAL PROVISIONS

Sec.
1. Short name of title.
2. Territory affected.
3. Effect on existing legislation.
4. Definitions.
5. Authority of commissioner's agents or assistants.

Section 1. Short name of title. The short name of this title shall be the "National Prohibition Act." (Oct. 28, 1919, c. 85, § 1, 41 Stat. 305.)

Editorial comment.—It has been suggested that the Wilson and Webb-Kenyon Acts quoted in the historical note to this section may still be effective in view of section 52 of this title. If this be true, it would seem that the portion of the Reed amendment quoted in the historical note, together with Act Oct. 3, 1917, c. 63, § 1110, 40 Stat. 322, and Act Feb. 24, 1919, c. 18, § 1407, 40 Stat. 1151, so far as they modify such portion of the Reed amendment may also be effective.

Historical Note

This section was the first section of an act entitled "An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research, and in the development of fuel, dye, and other lawful industries," cited in the credit to the text, therein designated the "National Prohibition Act" and also popularly known as the Volstead Act.

That act, which was passed over the President's veto, consisted of three titles in addition to this section. Title I bore the caption "To provide for the enforcement of war prohibition," and was evidently omitted from the Code as temporary and obsolete. Title II, "Prohibition of Intoxicating Beverages," is incorporated in chapter 2, and sections 4 and 5 of chapter 1 of this title. Title III, "Industrial alcohol," contained 21 sections. Sections 1 to 19 are incorporated in chapter 3 of this title. Section 20 is section 63 of chapter 2 of this title. Section 21 related to the time of taking effect of different parts of the act, and was evidently omitted from the Code as temporary and obsolete.

Restrictions on the importation, manufacture, sale, removal from bond, etc., of distilled spirits, and intoxicating liquors, until the conclusion of the war and termination of demobilization, and a provision authorizing the President to establish zones, and prohibit the sale, manufacture or distribution of intoxicating liquors therein, were contained in a part of section 1 of the Act of Nov. 21, 1918, c. 212, 40 Stat. 1046, known as the War Time Prohibition Act. An identical provision respecting the establishment of zones was contained in Res. Sept. 12, 1918, c. 170, 40 Stat. 958. Section 2 of the Act of Nov. 21,

1918, provided for the importation from Porto Rico of distilled spirits or alcohol produced prior to Oct. 3, 1917. These provisions were evidently omitted from the Code as temporary and obsolete.

The Wilson Original Packages Act of Aug. 8, 1890, c. 728, 26 Stat. 313, the Webb-Kenyon Act of March 1, 1913, c. 90, 37 Stat. 699, and a part of section 5 of the postal service appropriation act for the fiscal year 1918 (Act March 3, 1917, c. 162, 39 Stat. 1069) known as the Reed Amendment, were evidently omitted from the Code as superseded by the National Prohibition Act (incorporated in this title). As there is some question as to the propriety of their omission, they are here set out:

The Wilson Act: "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (26 Stat. 313.)

The Webb-Kenyon Act: "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited." (37 Stat. 699.)

The Reed Amendment (in part): "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, that nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State." 39 Stat. 1069.

The Reed Amendment was made applicable to the District of Columbia by Act Feb. 24, 1919, c. 18, § 1407, 40 Stat. 1151, and was limited to some extent by Act Oct. 3, 1917, c. 63, § 1110, 40 Stat. 329. A portion of the Reed Amendment, together with the acts just cited, so far as they modify such portion, are incorporated in sections 341 and 342 of Title 18, Criminal Code and Criminal Procedure.

Act Feb. 24, 1919, c. 18, § 601, 40 Stat. 1106, was probably omitted from the Code as superseded by this title, or the Eighteenth Amendment to the Constitution. It read as follows:

"No distilled spirits produced after October 3, 1917, shall be imported into the United States from any foreign country, or from the Virgin Islands (unless produced from products the growth of such islands, and not then into any State or Territory or District of the United States in which the manufacture or sale of intoxicating liquor is prohibited), or from Porto Rico, or the Philippine Islands. Under such rules, regulations and bonds as the Secretary may prescribe, the provisions of this section shall not apply to distilled spirits imported for other than (1) beverage purposes or (2) use in the manufacture or production of any article used or intended for use as a beverage."

A similar provision in Revenue Act of 1917, § 301, 40 Stat. 308, was repealed by Revenue Act of 1918, § 1400.

Cross-References

Provisions with respect to interstate shipments of intoxicating liquors are made by sections 388 to 390 of Title 18, Criminal Code and Criminal Procedure.

See, also, sections 241 to 253 of Title 25, Indians; chapters 5 and 6 of Title 26, Internal Revenue; and sections 261 to 291 of Title 48, Territories and Insular Possessions.

Notes of Decisions

1. Powers of national, state and municipal governments.
2. Force and validity.
3. Time of taking effect.
4. Tariff Act as superseding Prohibition Act.
5. Amendment of Act.
6. Repeal of prior laws.
7. Purpose of Act.
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10. —— Duty to enforce.

11. —— Injunction.
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15. State legislation—Validity in general.
16. —— Reference to, or adoption of, federal law.
17. —— Abrogation by federal law.
18. —— Operation and effect of state laws.
19. Rights and remedies under contracts.
20. Incidental consequences of violation of law—Disorderly conduct.
21. —— Dismissal from employment.
22. —— Income tax.
23. —— Impeachment of witnesses.
24. Judicial notice.

1. Powers of national, state and municipal governments.—"The states may enact new laws or may enforce any pre-existing laws as to intoxicating liquors which tend to effectuate and not defeat the purposes of Const. U. S. Amend. 18 and the Volstead Act [incorporated in this title]." Redden v. State (1922) 210 P. 358, 22 Okl. Cr. 179.

Federal government's power, granted by Const. Amend. 18, to enforce the prohibition of the manufacture, sale, and transportation of intoxicating liquor, carries with it power to enact any legislative measures reasonably adapted to promote the purpose. Selzman v. U. S. (1925) 45 S. Ct. 574, 268 U. S. 466, 69 L. Ed. 1054.

The federal government, in the exercise of the delegated power which it derives from the Eighteenth Amendment, may enact laws to secure prohibition. Ex parte Hixson (1923) 214 P. 677, 61 Cal. App. 200, writ of error dismissed Hixson v. Oakes (1924) 44 S. Ct. 514, 265 U. S. 254, 68 L. Ed. 1005.

State, in exercise of police power, has authority to prohibit manufacture, sale, transportation, and possession for use as beverage of intoxicating liquor, and to deprive it of its character as property. People v. Alfano (1926) 153 N. E. 729, 322 Ill. 384.

It is held that a city has the power to regulate the possession of intoxicating liquors by action which is not in conflict with the National Prohibition Act (incorporated in this title), or the laws of the state. U. S. v. Viess (D. C. Wash. 1921) 273 F. 279.

A license tax on sales of liquor by druggists cannot be imposed by a municipality, the sales being such as are permitted by this title. Morganfield v. Wathen (1924) 202 Ky. 641, 261 S. W. 12.

2. Force and validity.—The National Prohibition Act (incorporated in this title) is constitutional. Hensberg v. U. S. (C. C. A. Mo. 1923) 288 F. 370.

The National Prohibition Act (incorporated in this title) is not invalid, as taking private property for public use without just compensation, in violation of the Fifth Amendment, because as incidental to the exercise of a lawful power, loss may result to certain species of property. Christian Feigenspan, Inc., v. Bodine (D. C. N. J. 1920) 264 F. 186, affirmed State of Rhode Island v. Palmer (1920) 40 S. Ct. 486, 253 U. S. 350, 64 L. Ed. 946.

National Prohibition Act, tit. 2 (incorporated in this title), is not invalid, because enacted before Amendment 18 of Constitution became effective, pursuant to its terms, one year after its ratification. Druggan v. Anderson (1925) 46 S. Ct. 14, 269 U. S. 36, 70 L. Ed. 151.

It has been held that the National Prohibition Act (incorporated in this title) is supreme law of the land, and neither state, its citizens, nor its courts can override it. U. S. v. Sumner (Sup. 1926) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (1926) 214 N. Y. S. 930, 216 App. Div. 782.

But it has also been held that the Constitution as a whole, and not the National Prohibition Act (incorporated in this title), is the supreme law of the land. U. S. v. Myers (D. C. Ky. 1923) 287 F. 260.

The Volstead Act (incorporated in this title), passed by Congress for the purpose of carrying out the provisions of the Eighteenth Amendment, is, however, part of the supreme law of the land. Commonwealth v. Alderman (1921) 79 Pa. Super. Ct. 27.

The National Prohibition Act (incorporated in this title) having been enacted to carry out the provisions of a constitutional amendment applicable to all the states and territories, is binding on all the inhabitants thereof, under article 6 of the Constitution providing that the Constitution and laws of the United States in pursuance thereof shall be the supreme law of the land, and that the judges in every state shall be bound thereby. Farrelly v. Wells (Sup. 1921) 189 N. Y. S. 34, 115 Misc. Rep. 632.

Court cannot consider wisdom, or social, political, or economical aspects, of prohibition. People v. Wade (1926) 214 N. Y. S. 187, 126 Misc. Rep. 574, supplemental opinion People v. Wade, 127 Misc. Rep. 593 (1926) 214 N. Y. S. 781, 126 Misc. Rep. 762, and reversed on another ground (1926) 217 N. Y. S. 486.

All men are bound to know prohibitions of this act. Haynes v. U. S. (C. C. A. N. Y. 1925) 4 F.(2d) 889, certiorari denied Van Engelen v. U. S. (1925) 45 S. Ct. 638, 268 U. S. 703, 69 L. Ed. 1166.

3. Time of taking effect.—Under section 21 of Title III of the National Prohibition Act (temporary) providing that (sections 12 and 50 of this title) should take effect from and after the day the Eighteenth Amendment of the Constitution goes into effect, those sections took effect on January 17, 1920, the day after the constitutional amendment took effect, so that an indictment charging violation

January 16, 1920, must be quashed. Zimmerman v. U. S. (C. C. A. Ill. 1921) 277 F. 965.

4. Tariff Act as superseding Prohibition Act.—Tariff Act 1922 (chapter 3 of Title 19, Customs Duties), enacted after the passage of the National Prohibition Act (incorporated in this title), and the Willis-Campbell Act, supplementary thereto (also incorporated in this title), supersedes any of the provisions of any previous prohibition statute inconsistent therewith. Charles Zimmerman Sons Co. v. Ferguson (D. C. Mich. 1926) 16 F.(2d) 604, rehearing denied (D. C. 1927) 18 F. (2d) 125.

Under Tariff Act 1922, (chapter 3 of Title 19, Customs Duties) defining "merchandise" to include "merchandise, the importation of which is prohibited," intoxicating liquor for beverage purposes is dutiable, notwithstanding Eighteenth Amendment and National Prohibition Act (incorporated in this title) prohibiting importation of the liquor. U. S. v. Two Automobiles and Five Cases of Whisky (D. C. Cal. 1924) 2 F.(2d) 264.

5. Amendment of Act.—Legislature was held authorized to submit to voters at November, 1926, election question of whether Congress should amend Volstead Act (incorporated in this title) to authorize manufacture and sale of 2.75 per cent. beer, in view of Wis. St. 1925, §§ 6.10, 6.19, 6.22, 6.23, 6.68, 6.71. State v. Zimmerman (Wis. 1926) 210 N. W. 381.

Injunction to restrain such submission was held not warranted on ground that submission would result in illegal expenditure of $15 of taxpayers' money. Id.

Original jurisdiction of Supreme Court could be exercised in action to restrain such submission where, because of brief time that would elapse before election, there would be a denial of justice, unless court assumed jurisdiction. Id.

Contention that section of resolution prescribing manner in which question whether Volstead Act (incorporated in this title) should be amended was to be submitted to voters performed function of a law, and was invalid because not enacted in form and manner of a law was held immaterial, in view of Wis. St. 1925, §§ 6.01–6.81, where it was passed to give force and effect to another section of resolution which did not attempt to perform function of a law, but was confined to single function of designating question to be submitted. Id.

6. Repeal of prior laws.—See Annotation under section 52 of this title.

7. Purpose of Act.—The chief purpose of the framers of the Volstead Act (incorporated in this title) was to reduce and as far as possible to prevent the use of intoxicating liquors as a beverage. U. S. v. Turner (D. C. Va. 1920) 266 F. 248; U. S. v. Masters (D. C. Pa. 1920) 267 F. 581; Street v. Lincoln Safe Deposit Co. (D. C. N. Y. 1920) 267 F. 706, reversed on other grounds (1920) 41 S. Ct. 31, 254 U. S. 88, 65 L. Ed. 151, 10 A. L. R. 1548; Ledbetter v. Bailey (D. C. N. C. 1921) 274 F. 375; Kelly v. Lewellyn (D. C. Pa. 1921) 274 F. 108.

The primary object of the National Prohibition Act (incorporated in this title) is the prevention of the use of intoxicating liquors as a beverage, although it retains features of a revenue law. To effectuate that purpose the statute requires that all of its provisions shall be liberally construed. U. S. v. Sacein Rouhana Farhat (D. C. Ohio, 1920) 269 F. 33.

The purpose of Title II of the act (incorporated in this title) was to enforce the Eighteenth Amendment to the Constitution, but not to confiscate liquors lawfully owned at the time the amendment became effective, and which the owner intended to use in a lawful manner, and such purpose is of importance in determining the meaning of the act. Street v. Lincoln Safe Deposit Co. (N. Y. 1920) 41 S. Ct. 31, 254 U. S. 88, 65 L. Ed. 151, 10 A. L. R. 1548, reversing (D. C. 1920) 267 F. 706.

8. Construction in general.—"The eighteenth Amendment in its effect expresses a direction to Congress to make prohibition effective. The legislation embodied in the Prohibition Act [incorporated in this title] must be presumed to have been designed for the purpose of carrying out that mandate. Any doubts as to the construction must be resolved in favor of the obvious purpose of the law." U. S. v. Goodwin (D. C. Cal. 1924) 1 F.(2d) 36.

This act instead of granting a right is a limitation on privilege. Woods v. Seattle (D. C. Wash. 1921) 270 F. 315.

It is a prohibition statute solely, and limits and regulates existing rights of privileges, and does not confer any rights. Ex parte Hixson (1923) 214 P. 677, 61 Cal. App. 200, writ of error dismissed Hixon v. Oakes (1924) 44 S. Ct. 514, 265 U. S. 254, 68 L. Ed. 1005.

The National Prohibition Act (incorporated in this title) must be construed in the light of the 18th Amendment. Bryson v. State (1925) 108 S. E. 63, 27 Ga. App. 230.

Rev. St. § 2775 (repealed), recognizing the practice of carrying intoxicating liquor for beverage purposes as part of a ship's sea stores, was not in the nature of a promise for the future, and does not limit the application or construction of the Prohibition Amendment and National Prohibition Act (incorporated in this title) especially as such recognition has been withdrawn by Act Sept. 21, 1922 (chapter 3 of Title 19, Customs Duties.) Cunard S. S. Co. v. Mellon (N. Y. 1923) 43 S. Ct. 504, 262 U. S. 100, 67 L. Ed. 894, 27 A. L. R. 1306, affirming (D. C. 1922) 284 F.

890, reversing International Mercantile Marine v. Stuart (D. C. 1922) 285 F. 79.

9. Enforcement—In general.—With the exception of the crimes specified in Prohibition Act (incorporated in this title) the enforcement of the terms and provisions of the act is within the protection of the appropriate sections of the Criminal Code (incorporated in Title 18, Criminal Code and Criminal Procedure). U. S. v. Tynan (D. C. N. Y. 1923) 6 F.(2d) 668.

The state derives all powers as to enforcement of National Prohibition Act (incorporated in this title) from federal Constitution. U. S. v. Sumner (Sup. 1925) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (1926) 214 N. Y. S. 930, 216 App. Div. 782.

The President has no authority to use the naval forces in the enforcement of the National Prohibition Act (incorporated in this title), when no emergency exists. (1923) 33 Op. Atty. Gen. 562.

10. —— Duty to enforce.—The conductor of a railroad train, especially where by the law of the state he is made a special policeman, with power to make arrests, is charged with the duty of exercising reasonable care and diligence to see that the law is not violated by the illegal transportation of liquor on his train. Powell v. U. S. (C. C. A. N. C. 1924) 2 F.(2d) 47.

Congress cannot compel state courts to assume jurisdiction of actions to enforce National Prohibition Act (incorporated in this title); nor is there any implication of duty by a state court to lend its jurisdiction to enforcement of the laws of United States in behalf of United States. Ex parte Gounis (1924) 263 S. W. 988, 304 Mo. 428.

State cannot refuse process of its courts to prosecute actions authorized by Volstead Act (incorporated in this title), and cannot forbid its officers exercising powers or performing duties conferred and imposed thereby. U. S. v. Sumner (Sup. 1925) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (1927) 214 N. Y. S. 930, 216 App. Div. 782.

State courts and judges held, bound to assist in enforcement of Eighteenth Amendment to United States Constitution and Volstead Act (incorporated in this title). People v. Wade (1926) 214 N. Y. S. 187, 126 Misc. Rep. 574, reversed on other grounds (1926) 217 N. Y. S. 486, 127 Misc. Rep. 593.

11. —— Injunction.—Court of equity will not enjoin United States officers from giving credence to Treaty with Great Britain of May 22, 1924 (43 Stat. 1761), permitting vessels to carry liquor under seal, and require them to enforce Const. Amend. 18, and National Prohibition Act (incorporated in this title), unless it is necessary in order to protect property rights against injuries otherwise irremediable. Milliken v. Stone (C. C. A. N. Y. 1927) 16 F.(2d) 981, affirming (D. C. 1925) 7 F.(2d) 397.

Where bill for injunction alleging unconstitutionality of treaty, because violative of Eighteenth Amendment and National Prohibition Act (incorporated in this title) states no ground for equitable relief, the court will not determine constitutionality of treaty, though all parties desire such ruling. Milliken v. Stone (D. C. N. Y. 1925) 7 F.(2d) 397, affirmed (C. C. A. 1927) 16 F.(2d) 981.

12. —— Offenses in connection with enforcement.—See, also, notes to section 61 of this title.

Where only question in controversy was whether persons were trying to bribe accused or whether he was demanding money, for not informing against them for violating National Prohibition Act (incorporated in this title) it was permissible for witnesses to tell story so as to make clear sequence of events. Tolbert v. U. S. (C. C. A. S. C. 1926) 11 F.(2d) 80.

Though section 250 of Title 18, Criminal Code and Criminal Procedure, defining offense of obtaining money under threat of informing or as consideration for not informing against any violation of law, does not specify from whom such information is to be withheld, an indictment, charging information of violation of National Prohibition Act (incorporated in this title), was withheld from the "proper prohibition enforcement officer of the United States," is sufficient. Farkas v. U. S. (C. C. A. Ohio, 1924) 2 F.(2d) 644.

Evidence held to sustain conviction under section 250 of Title 18, Criminal Code and Criminal Procedure, for receipt of money under threat of informing, or as consideration for not informing, against another as violator of National Prohibition Act (incorporated in this title). Id.

In prosecution for receiving money under threat of informing or as consideration for not informing against another as violator of National Prohibition Act (incorporated in this title), where evidence did not indicate that information was withheld from any federal officer, but indicated that state officer and violation of state laws were involved, it was error not to direct verdict. Id.

A state has the power to punish the acceptance of bribe by a police officer for agreeing not to arrest a certain person for violation of the Volstead Act (incorporated in this title). Harris v. Superior Court (1921) 196 P. 895, 51 Cal. App. 15.

13. —— Expenses of enforcement.—Under County Law, N. Y. § 240, subd. 2, expenses of hiring detectives by district at-

torney to make investigations to catch violators of Volstead Act (incorporated in this title), are proper county charge. U. S. v. Sumner (Sup. 1925) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (1927) 214 N. Y. S. 930, 216 App. Div. 782.

14. Treaties.—Treaties with Great Britain and Norway (43 Stat. pt. 2, pp. 1761, 1772), affecting smuggling of liquor, exclusively determine status of liquor-laden vessels of appropriate nationality lying off coast of United States. The Sagatind (C. C. A. N. Y. 1926) 11 F.(2d) 673, 45 A. L. R. 1007, modifying U. S. v. The Sagatind (D. C. 1925) 8 F.(2d) 788.

15. State legislation—Validity in general.—Regulations more stringent than those in the federal act with respect to the manufacture and sale of intoxicants may be enacted by a state. State v. Barksdale (1921) 181 N. C. 621, 107 S. E. 505.

The fact that a statute or ordinance is more exacting than the Volstead Act (incorporated in this title) or imposes a penalty less or more severe does not invalidate it. Ex parte Volpi (1921) 199 P. 1090, 53 Cal. App. 229; Ex parte Kinney (1921) 200 P. 966, 53 Cal. App. 792; Youman v. Com. (1922) 193 Ky. 536, 237 S. W. 6, writ of error dismissed (1923) 43 S. Ct. 358, 261 U. S. 625, 67 L. Ed. 833; State v. Patterson (1926) 107 So. 106, 160 La. 269; Allen v. Com. (1921) 105 S. E. 589, 129 Va. 723; Gilbert v. State (1922) 18 Ala. App. 606, 93 So. 216; State v. Moore (1923) 36 Idaho, 565, 212 P. 349, affirmed Moore v. State (1924) 44 S. Ct. 333, 264 U. S. 569, 68 L. Ed. 854; Commonwealth v. Alderman (1923) 275 Pa. 483, 119 A. 551; State v. Johnson (1923) 61 Utah, 256, 212 P. 67; State v. Micheli (1922) 122 Wash. 286, 210 P. 603.

This act does not invalidate a state statute prohibiting the sale of intoxicating liquor which gives a different definition of intoxicating liquor and prescribes a different penalty for its sale. Franklin v. State (1921) 88 Tex. Cr. R. 342, 227 S. W. 486; Ex parte Gilmore (1921) 88 Tex. Cr. R. 529, 228 S. W. 199; Robert v. State (1921) 88 Tex. Cr. R. 488, 228 S. W. 230; Russell v. State (1921) 88 Tex. Cr. R. 582, 228 S. W. 948. And see Reece v. State (1921) 88 Tex. Cr. R. 569, 228 S. W. 562.

The fact that under a state statute the intoxicating quality of liquor must be shown, while under this act it is presumed from proof of alcoholic content, does not constitute a conflict between the state statute and this act. State v. Gauthier (1922) 121 Me. 522, 118 A. 380, 26 A. L. R. 652.

A state prohibition enforcement act is invalid to the extent that it makes violations of its provisions disorderly acts as distinguished from those which are criminal in their nature, since, prior to its enactment, Congress had already declared by necessary implication in this Act, that a person who violated any provision of the Eighteenth Amendment to the Federal Constitution should be guilty of crime. Katz v. Eldredge (1922) 117 A. 841, 97 N. J. Law, 123, reversing (1921) 96 N. J. Law, 382, 118 A. 242.

A state statute providing that the possession of intoxicating liquor for the purpose of sale shall be unlawful, does not conflict with the Volstead Act (incorporated in this title). Newton v. State (1923) 250 S. W. 1036, 94 Tex. Cr. R. 288; Lott v. State (1923) 251 S. W. 1070, 94 Tex. Cr. R. 630.

Loose Law, Del., § 1, par. 2, prohibiting the possession of more than one quart of intoxicating liquor at one time, held not invalid, as repugnant to the Eighteenth Amendment to the federal Constitution and the Volstead Act (incorporated in this title). State v. Fahey (Del. 1924) 126 A. 730.

Rash-Gullion Act, Ky., § 1, making no distinctions between possession of liquor and other violations of act, is not rendered invalid by fact that Congress in Volstead Act (incorporated in this title) recognized such distinctions. Pulliam v. Commonwealth (1925) 278 S. W. 134, 211 Ky. 766.

Act exempting householder from liability for making home-made liquors held not invalid as in conflict with Volstead Law (incorporated in this title). State v. Roberson (1926) 106 So. 728, 160 La. 155.

Volstead Act (incorporated in this title), does not conflict with statute against transporting within state, though part of interstate journey. Dittberner v. State (Tenn. 1927) 291 S. W. 839.

State statute, prohibiting the transportation of intoxicating liquor, held not unconstitutional because in conflict with United States Constitution and act of Congress (incorporated in this title) thereunder. Hughes v. State (1925) 268 S. W. 960, 99 Tex. Cr. R. 244; Knott v. State (1925) 274 S. W. 978, 100 Tex. Cr. R. 468; Lee v. State (1923) 255 S. W. 425, 95 Tex. Cr. R. 654.

The Tex. Dean Law (Vernon's Ann. Pen. Code Supp. 1922, art. 544¼ et seq.), held not unconstitutional as in conflict with Volstead Act (incorporated in this title). Brown v. State (1925) 276 S. W. 438, 101 Tex. Cr. R. 495; Guse v. States (1924) 97 Tex. Cr. R. 212, 260 S. W. 852; Mathis v. States (1924) 97 Tex. Cr. R. 222, 260 S. W. 603; Griffin v. State (1923) 255 S. W. 173, 95 Tex. Cr. R. 588.

The Woner Act (Pa.) is constitutional. Commonwealth v. Basha (1923) 80 Pa. Super. Ct. 320.

So far as Act June 9, 1891 (P. L. 257), as amended by Act July 30, 1897 (P. L. 464; Pa. St. 1920, § 14051), relating to the licensing of distillers, may contemplate or

authorize the licensing of the sale at wholesale of intoxicating liquors for beverage purposes, it is inconsistent with the Eighteenth Amendment and the National Prohibition Act (incorporated in this title), and is of no effect and void. In so far, however, as it relates to the sale by wholesale of such liquors for nonbeverage purposes in accordance with the regulations of the National Prohibition Act and its supplements, it is valid and still effective, and must be complied with by any one who desires to make such sale within the state without violating our penal statutes. In re Application of Pen-Mar Distilling Co. (1922) 80 Pa. Super. Ct. 221.

Portion of statute prohibiting transportation of intoxicating liquor without federal permit, defining offense, and prescribing penalty, held separable from unconstitutional provision that state need not allege or prove nonpossession of permit, and valid. State v. Webber (1926) 133 A. 738, 125 Me. 319.

"The Volstead Act, title 2, § 3 [section 12 of this title] prohibits the transportation of intoxicating liquor; in the Massachusetts statute the general transportation of intoxicating liquor is not forbidden, the transportation prohibited in the state statute being restricted to transportation by air craft, water craft and vehicles. The two statutes differ in the alcoholic content as a test for determining the meaning of the phrase 'intoxicating liquor,' and there may be other differences in the language and meaning of the two statutes. But none of these differences is sufficient to bring our statute in conflict with the act of Congress. The same purpose and end are sought by both statutes. The legislation of the commonwealth on the subject of intoxicating liquor 'in definitions, administrative agencies and penalties, may differ from but cannot be antagonistic to the act of Congress.' Commonwealth v. Nickerson (1920) 236 Mass. 281, 308, 128 N. E. 273, 285 (10 A. L. R. 1568); Samuels v. McCurdy (Ga. 1925) 45 S. Ct. 264, 267 U. S. 188, 69 L. Ed. 568, 37 A. L. R. 1378, supra; United States v. Lanza (Wash. 1922) 260 U. S. 377, 382, 43 S. Ct. 141, 67 L. Ed. 314. There is no real antagonism in the two statutes and our statute in no way seeks to give validity to acts prohibited by the Federal Constitution." Com. v. Dzewiacin (1925) 147 N. E. 582, 252 Mass. 126.

16. —— Reference to, or adoption of, federal law.—The Wright Act (Cal.) although adopting the penal provisions of the Volstead Act (incorporated in this title), is to be considered independent of that act. People v. Pagni (1924) 230 P. 1001, 69 Cal. App. 94.

Wright Act adopted only penal provisions of Volstead Act (incorporated in this title). People v. One 1924 Studebaker Sport Automobile (1925) 234 P. 856, 71 Cal. App. 134.

"As the federal law is the law of the land, and as it does not in essence conflict with state law, ordinances adopting the federal law by reference do not violate charter powers which authorize ordinances that are consistent with state and federal law." Wright v. Worth (1922) 91 So. 87, 83 Fla. 204, sustaining an ordinance providing that "it shall be unlawful for any person, persons, firm or corporation to have or keep in possession any intoxicating liquors, the possession of which is made unlawful by the act of Congress of the United States, or to offer the same for sale within the limits of the city of Tampa."

Statute attempting to adopt by reference penal provisions of National Prohibition Act (incorporated in this title), held invalid. State v. Armstrong (N. M. 1924) 243 P. 333.

Statute prohibiting transporting of intoxicating liquor without permit under National Prohibition Act (incorporated in this title), and amendments thereto refers to then existing amendments, and is not invalid as incorporating future amendments. State v. Webber (1926) 133 A. 738, 125 Me. 319.

Volstead Act (incorporated in this title), cannot be read into Snyder Act (Pa. St. Supp. 1924, §§ 14098a1–14098a18) under language of latter act. Commonwealth v. Berdenella (1927) 136 A. 791, 288 Pa. 510.

17. —— Abrogation by federal law.—The Volstead Act (incorporated in this title), did not in view of the provision of the Eighteenth Amendment as to "concurrent power" annul previous state legislation appropriate to the enforcement of that amendment. Palmer v. State (1921) 133 N. E. 388, 191 Ind. 683; Hess v. State (1922) 133 N. E. 880, 192 Ind. 50; Evans v. State (1922) 241 S. W. 147, 91 Tex. Cr. R. 646; State v. District Ct. (1920) 58 Mont. 684, 194 P. 308. See to the same effect Alexander v. State (1921) 148 Ark. 491, 230 S. W. 548; Jones v. Hicks (1920) 150 Ga. 657, 104 S. E. 771, 11 A. L. R. 1315; Scroggs v. State (1920) 150 Ga. 753, 105 S. E. 363; Smith v. State (1920) 150 Ga. 755, 105 S. E. 364; Shreveport v. Marx (1920) 148 La. 31, 86 So. 602; Meriwether v. State (1921) 125 Miss. 435, 87 So. 411; Kyzar v. State (1921) 125 Miss. 79, 87 So. 415; State v. Fore (1920) 180 N. C. 744, 105 S. E. 334; State v. Muse (1921) 181 N. C. 506, 107 S. E. 320; Banks v. State (1921) 88 Tex. Cr. R. 380, 227 S. W. 670; State v. Hartley (1921) 115 S. C. 524, 106 S. E. 766; Allen v. Com. (1921) 105 S. E. 589, 129 Va. 723; State v. Turner (1921) 196 P. 638, 115 Wash. 170; State v. Woods (1921) 198 P. 737, 116 Wash. 140; State v. Knosky (1921) 106 S. E. 642, 87 W. Va. 558.

Rev. Gen. St. 1920, Fla., § 5460, prohibiting possession, custody, or control of alco-

holic or intoxicating liquors or beverages, is not superseded by federal law, and does not violate federal or state Constitutions. Carroll v. Merritt (Fla. 1920) 109 So 630.

Const. U. S. Amend. 18, and Volstead Act (incorporated in this title), do not supersede or abrogate Georgia prohibition statute. Abbott v. State (1924) 125 S. E. 723, 33 Ga. App. 146.

City has inherent power without specific grant to suppress sale of liquor under Hood Bill (Act No. 39, Ex. Sess. of 1921) and such power is not abrogated by National Prohibition Act (incorporated in this title). City of Lafayette v. Deep (1925) 106 So. 654, 160 La. 5.

In Louisiana it was held that: "Act 66 of 1902, by prohibiting the selling of intoxicating liquors without a license, implies the right of any and every person to obtain the license. Such a law, if enacted subsequent to the adoption of the Eighteenth Amendment, would not be 'appropriate legislation.' It would be absolutely violative of the amendment. The statute is altogether inconsistent with the constitutional amendment, and is therefore without effect." State v. Green (1921) 148 La. 376, 86 So. 919.

The prohibitive features of Laws 1894, c. 140, and amendments thereto relating to the sales of intoxicating liquors in Allegany county without a license are still in force, and are not repugnant to, nor repealed by Const. U. S. Amend. 18, or the Volstead National Prohibition Act (incorporated in this title). Weisengoff v. State (1923) 123 A. 107, 143 Md. 638, affirmed **Molinari v. State of Maryland** (1924) 44 S. Ct. 179, 263 U. S. 685, 68 L. Ed. 506.

A state statute relating principally to nonintoxicating drinks, but containing some references to the licensing of the sale of intoxicants, is not repealed. Com. v. Vigliotti (1921) 271 Pa. 10, 115 A. 20.

18. —— Operation and effect of state laws.—Possession of intoxicating liquor, after Const. Amend. 18 and the Volstead Act (incorporated in this title) went into effect, being a violation of a state law as well as the federal statute, the possessor may, in a prosecution under the state statute, be punished as therein prescribed. Ex parte Ramsey (D. C. Fla. 1920) 265 F. 950.

In determining the question of necessity for liquor licenses, it was entirely proper for the court below to consider the fact that, under this act it would not be lawful for any person to whom a license issued to sell liquors containing one-half of one per cent., or more of alcohol. Cambria County Liquor Licenses (1921) 78 Pa. Super. Ct. 28.

19. Rights and remedies under contracts.—Tenant's right to maintain lease against landlord was gone, on breaking covenant to obey National Prohibition Law (incorporated in this title), and government, in abatement proceedings, may assist landlord to recover premises. U. S. v. Gaffney (C. C. A. N. Y. 1926) 10 F.(2d) 604.

Developments under the Act (incorporated in this title), held not to relieve distillery warehouse owner from obligation under contract or entitle her to pay on quantum meruit. Dowling v. Lucking (C. C. A. Ky. 1926) 13 F.(2d) 632.

Liability of purchaser of liquor in Mexico, resident of Arizona, held enforceable in courts of Arizona despite the Volstead Act (incorporated in this title). Veytia v. Alvarez (Ariz. 1926) 247 P. 117.

In Goldberg v. Callender (1921) 113 A. 170, 96 Conn. 182, a lease provided that: "It is hereby agreed that the premises herein leased shall be used only as a saloon and liquor establishment, and this instrument is conditioned upon said agreement, which shall be a condition precedent to the operation of this lease. * * * It is expressly agreed and understood by and between the parties hereto that if, at any time during the leasehold term, or any renewal thereof, the city of Hartford shall vote 'no license,' or if for any reason other than the unsuitability of the applicant a license should be refused by the county commissioners in and for Hartford county in said premises, during the leasehold term or any renewal thereof, then this lease is void at the option of said party of the second part." It was held that the lessee had the option to declare the lease void on the passage of this act, but that if he did not exercise his option, he was bound by the provisions of the lease and could not use the premises for any other purpose than that specified therein.

In action for balance on sale of liquid mixtures outside of state, answer stating that mixtures contained alcohol and were for purpose of resale in local option territory held not to state defense under National Prohibition Act (incorporated in this title). Sinnett v. J. R. Watkins Co. (1926) 282 S. W. 769, 214 Ky. 76.

Tenant, conducting business on premises from which he was wrongfully evicted by landlord was held not entitled as damages to profits resulting from illegal sales of intoxicating liquor. Monica v. Di Benedetto (N. J. Sup. 1925) 130 A. 730.

In an action by a seller to recover the purchase price of whisky, the burden of proof is upon him to show that the sale was legal. Adler v. Zimmerman (1922) 233 N. Y. 431, 135 N. E. 840, reversing (1921) 198 App. Div. 927, 189 N. Y. S. 937.

Where under a contract for sale and shipment of alcohol, which was supplemented by a letter of credit, vendor at date of shipment would have been compelled to ship such alcohol to New York,

which would have been in violation of the National Prohibition Act (incorporated in this title), he was not bound to comply with such contract, and vendee is not entitled to recover damages for his failure to do so. Boer v. Garcia (1925) 240 N. Y. 9, 147 N. E. 231, affirming (1924) 204 N. Y. S. 895, 208 App. Div. 841, which affirmed (Sup. 1922) 193 N. Y. S. 814, 118 Misc. Rep. 272.

Where husband and wife, fearing penalties for violation of National Prohibition Act (incorporated in this title), executed and recorded deed to wife's brother, and mailed it to grantee, conditioned on his retransfer of land to them, if grantee accepted the deed, he accepted the condition, and grantors were entitled to specific performance of contract to deed premises to them. Buszozak v. Wolo (Sup. 1925) 211 N. Y. S. 557, 125 Misc. Rep. 546.

Where they mailed deed to him, with request that he execute deed of reconveyance, held, that there was no delivery, and, if there was, it was on a valid condition, when proved by accompanying letter. Id.

Where no action could have been taken by the federal government which could have affected title to their property, in transferring it they were not guilty of unconscionable act, which would defeat their right to specific performance or cancellation of record of deed. Id.

Where a lease provided that, if any law interfering with the traffic in liquors was passed, "then and in that event" lessee should have the right to terminate the lease on 90 days' notice, held, that time was not of the essence of the right to terminate, and a notice of intention to terminate, served more than 3 years after the federal Prohibition Act (incorporated in this title) went into effect, was not, as a matter of law, too late, in the absence of injury to lessor, and in view of the fact that the validity of the act was determined only after protracted litigation; the word "then" not being used in its strict grammatical sense as an adverb of time, but to point out a contingency or event. Shear v. Healy (1924) 203 N. Y. S. 387, 208 App. Div. 269, reversing (Sup. 1923) 200 N. Y. S. 770, 121 Misc. Rep. 218.

Selling of liquor on leased premises in violation of National Prohibition Act (incorporated in this title), held illegal trade or business, justifying tenants' removal under Civil Practice Act, § 1410, subd. 5. Elmore v. Berti (1926) 217 N. Y. S. 813, 128 Misc. Rep. 74.

Landlord, who knew of and consented to tenants' illegal sale of intoxicating liquors on premises, held not in pari delicto with tenants, so as to bar summary proceeding. Id.

A contract for the sale of intoxicating liquor must be construed as contemplating a sale and transportation of such liquor for a lawful purpose, if it could have been made for a lawful purpose, especially where it provided for a sale and delivery of the liquor for lawful use and under government permit. Ciocca-Lombardi Wine Co. v. Fucini (1923) 198 N. Y. S. 114, 204 App. Div. 392.

Under Const. U. S. Amend. 18, and National Prohibition Act (incorporated in this title), a contract for the sale of intoxicating liquor would be illegal, if construed as providing for the sale or transportation of such liquor for beverage purposes. Id.

A lease of property for five years is not terminated by the National Prohibition Act (incorporated in this title), where, though the property was used for saloon purposes, the lease did not restrict the tenant to that use. That the lessee had paid his predecessor in possession a large sum for barroom fixtures and good will is immaterial on the question of eviction. Jacobs v. Mingle (1923) 278 Pa. St. 250, 122 A. 285.

The uncontradicted testimony of defendant's witness that his suggestion to plaintiff's representative that alcohol be shipped direct from Havana to Holland was refused, and the said representative insisted that the goods come via New York, clearly indicated that it was the parties' original intention to perform the contract in violation of the National Prohibition Act (incorporated in this title), and the motion to set aside the verdict in favor of the plaintiff will be granted, and complaint dismissed. Boer v. Garcia (Sup. 1922) 193 N. Y. S. 814, 118 Misc. Rep. 272.

20. Incidental consequences of violation of law—Disorderly conduct.—Neither violation of Volstead Act (incorporated in this title) by restaurant proprietor nor drinking of intoxicating liquor by his patrons is "disorderly conduct," within Penal Law, § 722. People v. Barbera (1926) 214 N. Y. S. 778, 127 Misc. Rep. 864.

Magistrate's Court held without jurisdiction of offense of selling intoxicating liquor in violation of Volstead Act (incorporated in this title), and conviction of disorderly conduct was unauthorized. People v. Wade (Sp. Sess. 1926) 217 N. Y. S. 486, 127 Misc. Rep. 593, reversing (City Mag. Ct. 1926) 214 N. Y. S. 187, 126 Misc. Rep. 574 and (1926) 214 N. Y. S. 781, 126 Misc. Rep. 762.

21. —— Dismissal from employment.—Writing stating indictment under National Prohibition Act (incorporated in this title) as reasons for dismissing detective held not so defective as to be incapable of amendment. Nichols v. Sunderland (Cal. App. 1926) 247 P. 614.

Such writing with note that person dismissed might demand hearing on dismissal, held not void as absolute "dismissal." Id.

Amendment of such writing adding inefficiency and bribery may not be assumed to state new cause. Id.

22. —— Income tax.—Under Revenue Act 1921, § 213 (a), (repealed) defining gross income as income derived from any business carried on for gain or profit, or gains or profits and income derived from any source whatever, gains derived from business in violation of National Prohibition Act (incorporated in this title), are subject to tax. U. S. v. Sullivan (S. C. 1927) 47 S. Ct. 607, 71 L. Ed. ——, reversing Sullivan v. U. S. (C. C. A. 1926) 15 F.(2d) 809.

Requiring under Revenue Act 1921, §§ 223 (a), 253 (repealed) return of gains derived from business in violation of the National Prohibition Act (incorporated in this title), is not in violation of Const. Amend. 5, since, although taxpayer might be privileged from answering certain questions called for in return, he could not on such account refuse to make any return at all. Id.

Profits from sale of liquor in violation of law held taxable. Steinberg v. U. S. (C. C. A. N. Y. 1926) 14 F.(2d) 564.

23. —— Impeachment of witnesses.—Where defendant, charged with unlawfully receiving and concealing opium, over his objection that it would incriminate him, was required to testify that his purpose at particular time was to violate National Prohibition Law (incorporated in this title), but further testified that such intent was not carried out, held, he was not prejudiced by such examination so as to constitute a reversible error. Willmering v. U. S. (C. C. A. Tex. 1925) 4 F.(2d) 209, certiorari denied (1925) 45 S. Ct. 503, 267 U. S. 605, 69 L. Ed. 810.

24. Judicial notice.—Court takes judicial notice that there are many kinds of beer and ale in various degrees of adjacency to former legalized product and which may be manufactured and sold under Const. U. S. Amend. 18, and Volstead Act (incorporated in this title). Hollender v. Rochester Food Products Corporation (1923) 207 N. Y. S. 321, 124 Misc. Rep. 130.

It is common knowledge that Volstead Act (incorporated in this title), was not as rigidly enforced in 1922 as in 1926. Gonch v. Republic Storage Co. (1926) 219 N. Y. S. 46, 218 App. Div. 584.

§ 2. Territory affected. This title shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this title in such Territory and islands. (Nov. 23, 1921, c. 134, § 3, 42 Stat. 223.)

Historical Note

This was section 3 of an act entitled "An act supplemental to the National Prohibition Act," cited in the credit to the text, known as the Willis-Campbell Act.

Prior to its incorporation into the Code, it contained the words "this Act and the National Prohibition Act" in the two places where the words "this title" now appear.

That Act contained six sections. Section 1 was not carried into the Code, but merely provided that certain terms should have the same meaning as in Title II of the National Prohibition Act, and is doubtless covered by section 4 of this title. Sections 2, 3, and 5, are incorporated in this section and sections 8, 15, 18, 20, 53, 54 and 56 of this title. Section 6 is incorporated in sections 53 and 77 of Title 18, Criminal Code and Criminal Procedure. Section 4 was not carried into the Code. Its first sentence authorized the Commissioner to make regulations to carry into effect the provisions of that Act, and is probably sufficiently covered by paragraph (7), of section 4 of this title. The second sentence made violations of that Act subject to the same penalties provided for in the National Prohibition Act (incorporated in this title), and is probably sufficiently covered by section 46 of this title.

Notes of Decisions

1. Territory to which statute applicable in general.—Prohibition Law (incorporated in this title) as applied to unlawful transportation is effective only in territory of United States. Romano v. U. S. (C. C. A. N. Y. 1925) 9 F.(2d) 522.

Prior to the enactment of the text section it was held that the Volstead Act (incorporated in this title), was not applicable in the Philippine Islands or in the Virgin Islands. (1920) 32 Op. Atty. Gen. 258; (1921) 32 Op. Atty. Gen. 422.

The Prohibition Amendment covers, and is confined to, the physical territory of the United States, and does not apply to domestic merchant ships outside the waters of the United States, whether on the high seas or in foreign waters, but does apply to foreign merchant ships when within the territorial waters of the

United States. Cunard S. S. Co. v. Mellon (N. Y. 1923) 43 S. Ct. 504, 262 U. S. 100, 67 L. Ed. 894, 27 A. L. R. 1306, affirming (D. C. 1922) 284 F. 890, reversing International Mercantile Marine v. Stuart (D. C. 1922) 285 F. 79.

In view of sections 12, 33, 35–37, and 40 of this title the National Prohibition Act (incorporated in this title), is operative throughout the territorial limits of the United States, subject only to the exception with respect to the Panama Canal and Panama Railroad contained in section 63 of this title and applies to all merchant vessels, whether foreign or domestic, when within the territorial waters of the United States, but does not apply to domestic vessels when outside such waters. Id.

The foregoing decision doubtless overrules (1920) 32 Op. Atty. Gen. 332, holding that the National Prohibition Act (incorporated in this title), applies to persons on board American ships, whether in American waters, on the high seas, or in foreign waters, and (1922) 33 Op. Atty. Gen. 335, holding that American ships wherever they may be are included in the terms of the Eighteenth Amendment.

The Eighteenth Amendment and the National Prohibition Act (incorporated in this title) prohibit as unlawful the possession and transportation of beverage liquors on board foreign vessels while in the territorial waters of the United States, whether such liquors are sealed or open. (1922) 33 Op. Atty. Gen. 335.

2. Hawaii.—Under this section, a circuit court of the territory has jurisdiction on indictments found by a grand jury drawn and impanelled within the circuit for offenses involving violations of the National Prohibition Act (incorporated in this title). Territory v. Kitahara (1923) 27 Haw. 397; Territory v. Higashiguchi (1923) 27 Haw. 399.

Under this section the district courts of Hawaii have jurisdiction of criminal cases in which defendants are charged with a first offense of manufacturing intoxicating liquor contrary to the National Prohibition Act (incorporated in this title). In re Abreu (1923) 27 Haw. 237.

3. Porto Rico.—National Prohibition Act (incorporated in this title) is in force in Porto Rico. Ramos v. U. S. (C. C. A. Porto Rico, 1926) 12 F.(2d) 761.

4. Offenses outside jurisdiction in general.—In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title) evidence of transactions between one defendant and Canadian corporation, which had sold liquor to him, held not irrelevant, because they had occurred outside jurisdiction of United States. Horie v. U. S. (C. C. A. Alaska, 1926) 15 F.(2d) 762, certiorari denied (1927) 47 S. Ct. 459, 71 L. Ed. —.

Where alleged seller of liquor gave written order on third person for liquor which was actually delivered in Canada, held conviction for sale could not be sustained under National Prohibition Act (incorporated in this title), in absence of proof that liquor belonged to defendant rather than to third person. La Fountain v. U. S. (C. C. A. N. Y. 1926) 14 F. (2d) 562.

5. Offenses at sea.—Indictment of master and crew of schooner for acts committed 24 miles of coast held not to charge violation of Volstead Act (incorporated in this title). U. S. v. Archer (D. C. Ala. 1926) 12 F.(2d) 137.

Gift of two cases of liquor beyond 12-mile limit held not violation of National Prohibition Act (incorporated in this title), where no arrangement was made to get liquor ashore. U. S. v. 2,180 Cases of Champagne (C. C. A. N. Y. 1926) 9 F. (2d) 710.

Treaties with Great Britain and Norway (43 Stat. pt. 2, pp. 1761, 1772), affecting smuggling of liquor, exclusively determine status of liquor-laden vessels of appropriate nationality lying off coast of United States. The Sagatind (C. C. A. N. Y. 1926) 11 F.(2d) 673, 45 A. L. R. 1007, modifying U. S. v. The Sagatind (D. C. 1925) 8 F.(2d) 788.

Rum-smuggling treaties with Great Britain and Norway are not self-executing, in sense that they extend territorial jurisdiction of laws of United States, and vessels and liquor cargo seized *held* not subject to forfeiture. Id.

§ 3. Effect on existing legislation. All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title; but if any act is a violation of any of such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. (Nov. 23, 1921, c. 134, § 5, 42 Stat. 223.)

Historical Note

See the Historical Note to section 2 of this title.

This section, prior to its incorporation into the Code, contained the words "of the National Prohibition Act or of this Act" in two places where the words "of this title" now appear.

Cross-References

Portions of the original text of this section omitted here will be found in sections 53 and 54 of this title.

Notes of Decisions

See, also, notes to section 52 of this title.

1. Construction and effect in general.—This section was in effect a re-enactment of the provisions of the revenue laws relating to manufacture and sale of intoxicating liquors, which had been repealed by the National Prohibition Act (incorporated in this title), so that prosecutions may be maintained for the violation of those revenue acts, committed after the supplemental act (incorporated in part in this section), took effect, though not for such acts subsequent to the National Prohibition Act, and before the effective date of the supplemental act. But, even if it purported to construe the National Prohibition Act as leaving in force the prior statutes which the Supreme Court had declared were repealed by the Prohibition Act, it could not give retrospective criminality to acts that were done before it was passed, and that were not criminal, except for the statutes held to have been repealed. U. S. v. Stafoff (Mo. 1923) 43 S. Ct. 197, 260 U. S. 477, 67 L. Ed. 358.

Prosecution for importing liquors held properly brought under Tariff Act (chapter 3 of Title 19, Customs Duties) instead of National Prohibition Act (incorporated in this title), in view of this section. U. S. v. Cardwell (D. C. Mich. 1925) 9 F.(2d) 146.

Where rented automobile, being unlawfully used in transportation of intoxicating liquor for beverage purposes, was abandoned, and its owner not apprehended, government was not warranted in proceeding under sections 1181 and 1182 of Title 26, Internal Revenue, thereby preventing innocent owner from reclaiming property, rather than under section 40 of this title, notwithstanding section 52 of this title, and this section. U. S. v. Milstone (1925) 6 F.(2d) 451, 55 App. D. C. 356.

Though under Laws Or. 1923, p. 43, § 11, and section 40 of this title, interest of innocent vendor of automobile, who retains title or mortgage, is not forfeited by seizure for vendee's violation, vendor's interest is not fully protected, so as to render insurance against confiscation contrary to public policy. Fidelity & Deposit Co. of Maryland v. Moore (D. C. Or. 1925) 3 F.(2d) 652, appeal dismissed Moore v. Fidelity & Deposit Co. (1926) 272 U. S. 317, 47 S. Ct. 105, 71 L. Ed. —.

Sections 1181 and 1182 of Title 26, Internal Revenue, authorizing forfeiture of vehicles for violation of revenue laws, when considered with sections 40 and 52 of this title, and this section, held to authorize forfeiture of automobiles used in unlawful removal and concealment of intoxicating liquors on which no tax was paid. U. S. v. One Ford Automobile (D. C. Tenn. 1924) 2 F.(2d) 882.

The penalties provided by section 483 of Title 19, Customs Duties, including forfeiture of a vehicle used, have no application to importation into the United States of intoxicating liquors in violation of National Prohibition Act (incorporated in this title), prior to the passage of the supplemental act of November 23, 1921 (incorporated in part in this section), but apply to importations prior to that date only when the requirements of that act have been fully complied with and the duty has not been paid. U. S. v. Federal Ins. Co. (C. C. A. Mich. 1922) 284 F. 821.

This section held not applicable to prosecution under indictment filed prior to its enactment. U. S. v. McKenzie (D. C. Mich. 1922) 283 F. 667.

Since in January, 1921, no authority existed under sections 1181 and 1182 of Title 26, Internal Revenue, for confiscation of automobile illegally engaged in liquor traffic, confiscation at that time was under section 40 of this title; this section re-enacting all laws in force when National Prohibition Act (incorporated in this title) became effective, not being enacted until November 23, 1921. Midland Motor Co. v. Norwich Union Fire Ins. Soc. (1925) 234 P. 482, 72 Mont. 583.

2. Acts repealed.—See, also, notes to section 52 of this title.

In view of this section, section 40 of this title will not be held to have impliedly repealed sections 1181 and 1182 of Title 26, Internal Revenue, relative to forfeiture of vehicles, unless in direct conflict therewith. U. S. v. One Ford Coupé Automobile (Ala. 1926) 47 S. Ct. 154, 272 U. S. 321, 71 L. Ed. —, 47 A. L. R. 1025, reversing U. S. v. Garth Motor Co. (C. C. A. 1925) 4 F.(2d) 523.

Any question as to the repeal of sections 1181 and 1182 of Title 26, Internal Revenue, providing for forfeiture of ve-

hicles used for removal or concealment of taxable property with intent to defraud the United States of the tax thereon, by the Prohibition Act (incorporated in this title) was removed by this section. U. S. v. One Ford Coupé (D. C. La. 1924) 3 F.(2d) 64.

Sections 1181 and 1182 of Title 26, Internal Revenue, providing for the forfeiture of vehicles used in the transportation of whisky with intent to defraud the United States of taxes due thereon, was not repealed by the National Prohibition Act (incorporated in this title), especially in view of this section, declaring all laws in regard to the manufacture and taxation of, and traffic in, intoxicating liquors in force, when the National Prohibition Act was adopted, are continued in force. U. S. v. One Buick Roadster (D. C. Mont. 1922) 280 F. 517.

Under section 961 of Title 46, Shipping, the rights of a mortgagee are protected on seizure of the vessel for illegal transportation of liquor in violation of Prohibition Act (incorporated in this title), unless he authorized, consented, or conspired to effect the illegal use; such statute not being repealed pro tanto by the Willis-Campbell Act (incorporated in part in this section). The Maberhex (D. C. R. I. 1925) 6 F.(2d) 415.

3. Acts superseded.—Section 40 of this title, providing for forfeiture of automobiles used for removal or transportation of intoxicating liquor, applies, whether automobile be actually in motion or not, and supersedes sections 1181 and 1182 of Title 26, Internal Revenue, relating to forfeiture of automobile for use with intent to defraud government of internal revenue taxes, notwithstanding this section continuing in force laws not in conflict with Prohibition Act (incorporated in this title). U. S. v. Garth Motor Co. (C. C. A. Ala. 1925) 4 F.(2d) 528, certiorari granted U. S. v. One Ford Coupé Automobile No. 4,766,501, Alabama License No. 100,978 (1925) 45 S. Ct. 640, 268 U. S. 687, 69 L. Ed. 1157.

4. Acts continued in force.—In view of this section, section 483 of Title 19, Customs Duties, providing for forfeiture of vehicles used in conveying merchandise illegally imported, continued in force, and a proceeding for forfeiture may be brought thereunder, instead of under the National Prohibition Act, when the merchandise illegally imported consists of intoxicating liquors. U. S. v. One Packard Sedan (D. C. Fla. 1926) 14 F.(2d) 874; U. S. v. Cahill (C. C. A. Mass. 1926) 13 F.(2d) 83; U. S. v. One Essex Coupé (D. C. Mont. 1923) 291 F. 479.

Sections 485 and 486 of Title 26, Internal Revenue, prohibiting withdrawal of alcohol tax free for manufacturing beverage and recovery by redistillation of denatured alcohol, was by Willis-Campbell Act (incorporated in part in this section) continued in force, notwithstanding National Prohibition Act (incorporated in this title). Bilodeau v. U. S. (C. C. A. Cal. 1926) 14 F.(2d) 582, certiorari denied (1926) 47 S. Ct. 245, 71 L. Ed. —.

Sections 241 and 244 of Title 25, Indians, and Act March 1, 1895, c. 145, § 8 (omitted) relating to possession, sale, etc., of liquor in Indian territory, continued in force after adoption of National Prohibition Act (incorporated in this title) in view of this section. Ex parte Sharp (D. C. Okl. 1926) 13 F.(2d) 651, affirmed Sharp v. U. S. (C. C. A. 1926) 16 F.(2d) 876.

Under this section continuing all penalties for violation of any liquor laws then in effect, unless directly in conflict with the National Prohibition Act (incorporated in this title) or supplemental act (incorporated in part in this section) the Alaska Dry Act and the National Prohibition Act, are both in force in Alaska, and in case of any inconsistency the latter prevails. Peterson v. U. S. (C. C. A. Alaska, 1924) 297 F. 1000.

Sections 1181 and 1182 of Title 26, Internal Revenue, were continued in force by this section. U. S. v. One Ford Automobile (D. C. Tenn. 1924) 1 F.(2d) 654. Sections 1181 and 1182 of Title 26, Internal Revenue, and section 483 of Title 19, Customs Duties, forfeiting vehicles used to defeat taxes, are not in direct conflict with the National Prohibition Act (incorporated in this title), or with this Act, and are in full force and effect. U. S. v. One Essex Coupé (D. C. Mont. 1923) 291 F. 479.

Par. 237, Schedule H of the Act of Oct. 3, 1913 (repealed), imposing a customs duty on the importation of distilled spirits, was not in direct conflict with the National Prohibition Act (incorporated in this title), or with this section, and was held to be in full force and effect. U. S. v. One Essex Coupé (D. C. Mont. 1923) 291 F. 479.

Sec. 600 of the Act of Feb. 24, 1919 (incorporated in part in section 245 of Title 26, Internal Revenue), imposing an internal revenue tax on the production of distilled spirits, is not in direct conflict with the National Prohibition Act (incorporated in this title), or with this Act, and is in full force and effect. Id.

Rev. St. § 3296 (section 404 of Title 26, Internal Revenue, making it an offense to remove spirits from a bonded warehouse otherwise than as provided by law, was continued in force by this section. Miller v. U. S. (C. C. A. Ill. 1925) 4 F.(2d) 228, certiorari denied (1925) 45 S. Ct. 511, 268 U. S. 692, 69 L. Ed. 1160.

Statute as to forfeiture of conveyance used to defraud government of tax is in force as to intoxicating liquors in view of Act Nov. 23, 1921 (incorporated in part in this section). National Bond & Investment Co. v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 942.

5. Acts revived or re-enacted.—It has been held that the re-enactment by this section of "all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws" which may have been impliedly repealed by the National Prohibition Act (incorporated in this title), does not include provisions of sections 1181 and 1182 of Title 26, Internal Revenue, which only incidentally affect liquor taxation where such provisions are in direct conflict with those of the Prohibition Act. Commercial Credit Co. v. U. S. (C. C. A. Ohio, 1925) 5 F.(2d) 1. But in U. S. v. One White One-Ton Truck (D. C. Wash. 1925) 4 F.(2d) 413, it was held that sections 1181 and 1182 of Title 26, Internal Revenue, providing inter alia, for forfeiture of vehicles used in removal of property with intent to defraud the United States of the tax thereon, were in effect reenacted as applied to intoxicating liquors by section 88 of this title, and this section. And see, also, preceding notes as to such sections.

Laws expressly or impliedly repealed by National Prohibition Act (incorporated in this title), are revived by Willis-Campbell Act (incorporated in part in this section), if not inconsistent therewith. U. S. v. One Bay State Roadster (D. C. Conn. 1924) 2 F.(2d) 616.

R. S. sec. 3257 (section 261 of Title 26, Internal Revenue), penalizing one engaged in carrying on business of distiller and distilling quantity of spirits and defrauding or attempting to defraud the United States of the tax thereon, was not directly in conflict with National Prohibition Act (incorporated in this title), within this section, reviving former laws not in such direct conflict. U. S. v. Knoblauch (D. C. Neb. 1923) 291 F. 407.

Sections 303 and 304 of Title 26, Internal Revenue, requiring distilleries to display certain signs, was repealed by the National Prohibition Act (incorporated in this title) and not revived by this section. Id.

The sections of the internal revenue laws relating to the manufacture and sale of intoxicating liquor which were superseded by the National Prohibition Act (incorporated in this title), were re-enacted by this section, but the customs laws which had also been superseded by the Prohibition Act were not, in so far as they related to the importation of intoxicating liquor, re-enacted by this section. Bruno v. U. S. (C. C. A. Mass. 1923) 289 F. 649.

R. S. §§ 2865, 3082 (repealed), relating to smuggling, repealed by National Prohibition Act (incorporated in this title), so far as concerns the importation of intoxicating liquors, held not revived by this section, and a search warrant to search for liquors alleged to have been imported in violation of law could not lawfully issue on the showing required by R. S. § 3066 (repealed). U. S. v. Boasberg (D. C. La. 1922) 283 F. 305, writ of error dismissed (1923) 45 S. Ct. 246, 260 U. S. 756, 67 L. Ed. 498.

6. Prosecution under different law as bar.—Under Prohibition Act (incorporated in this title) as amended by this section, a proceeding against a vessel for illegal transportation under that act is an election, which bars a proceeding for the same act under the customs laws. The Spray (D. C. R. I. 1925) 6 F.(2d) 414.

The provision in the original text of this section that if any act is a violation of other laws relating to liquor, and also of the Prohibition Act (incorporated in this title), a conviction for such act under one shall bar prosecution under the other, does not bar a suit for forfeiture of liquor, under sections 1181 and 1182 of Title 26, Internal Revenue, for attempted fraud on the revenue, because of the prior conviction of the claimant under the Prohibition Act for unlawful possession of the liquor. U. S. v. 385 Barrels, etc., of Wine (D. C. N. Y. 1924) 300 F. 565.

But after a defendant had been convicted for the unlawful transportation of liquor under the National Prohibition Act (incorporated in this title), and a petitioning claimant under section 40 of this title had shown cause why the transporting automobile should not be sold, though no order of sale had been made it was held that the government could not proceed under sections 1181 and 1182 of Title 26, Internal Revenue, under which a vehicle used to transport goods with the intent to defraud the United States of a tax is forfeited, irrespective of innocent lienors, in view of the provision of this section to the effect that a conviction under the Prohibition Act bars a prosecution under another statute for the same offense. U. S. v. Torres (D. C. Md. 1923) 291 F. 138.

§ 4. Definitions. When used in this title* (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for bever-

age purposes: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 58 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

(2) The word "person" shall mean and include natural persons, associations, copartnerships, and corporations.

(3) The word "commissioner" shall mean Commissioner of Internal Revenue.

(4) The term "application" shall mean a formal written request supported by a verified statement of facts showing that the commissioner may grant the request.

(5) The term "permit" shall mean a formal written authorization by the commissioner setting forth specifically therein the things that are authorized.

(6) The term "bond" shall mean an obligation authorized or required by or under this title or any regulation, executed in such form and for such a penal sum as may be required by a court, the commissioner, or prescribed by regulation.

(7) The term "regulation" shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this title, and the commissioner is authorized to make such regulations. (Oct. 28, 1919, c. 85, Title II, § 1, 41 Stat. 307.†)

* It would seem that the words "or in section 77 of Title 18," should be inserted.

† It would seem that "Nov. 23, 1921, c. 134, § 1, 42 Stat. 222" should be added to the credit.

Historical Note

Prior to its incorporation into the Code, this section defined the terms therein set out as used in Titles II and III of the Act of Oct. 28, 1919. However, Act Nov. 23, 1921, c. 134, § 1, 42 Stat. 222, provided that the words "person," "commissioner," "application," "permit," "regulation," and "liquor," and the phrase "intoxicating liquor," when used in that Act, should have the same meaning as in Title II of the National Prohibition Act. Titles II and III of the National Prohibition Act are incorporated in this title; and the Act of Nov. 23, 1921, c. 134, is incorporated in this title and in sections 53 and 77 of Title 18, Criminal Code and Criminal Procedure. Section 53 of Title 18 does not however, contain any of the words defined in this section.

Cross-References

The portion of the original text of this section omitted here is incorporated in section 5 of this title.

Notes of Decisions

I. Subd. (1). "Liquor" or "Intoxicating Liquor"

1. In general.
2. Validity.
3. State legislation.
4. Limitation of Act to beverage liquor.
5. Allegation and proof in general.
6. Indictment and information.
7. Judicial notice.
8. Evidence.
9. Question for court or jury.

II. Subd. (7). Regulations

21. Power of Commissioner in general.
22. Regulations in general.
23. Effect in Indian Territory.
24. Permits.
25. Indictment.
26. Evidence.

I. SUBD. (1). "LIQUOR" OR "INTOXICATING LIQUOR"

1. In general.—The word "liquor" as used in section 13 of this title means liq-

uor as defined in this section. (1920) 32 Op. Atty. Gen. 361.

Under this section, defining "liquor" and "intoxicating liquor," and providing that such definition shall not extend to dealcoholized wine nor to any beverage or liquor produced by the process by which beer, ale, porter or wine is produced if it contains less than one-half of 1 per centum of alcohol by volume and is made as prescribed in section 58 of this title, and is otherwise denominated than as beer, ale or porter, a beverage within the proviso is not within the purview of the act and cannot be brought within it by any "regulation" of the Commissioner of Internal Revenue therein authorized. Oertel Co. v. Gregory, Dist. Atty. (D. C. Ky. 1921) 270 F. 789.

"Moonshine whisky is whisky within the meaning of that word as used in the National Prohibition Act [incorporated in this title]." U. S. v. Golden (D. C. Minn. 1923) 1 F.(2d) 543.

Congress has power to establish a standard for determining whether liquor is intoxicating for the purpose of carrying out the provisions of the Eighteenth Amendment. U. S. v. Hill (D. C. Md. 1924) 1 F.(2d) 954.

2. Validity.—In the absence of an organic definition, Congress has implied power to define the subject of a federal organic prohibition or regulation, and the definition of "intoxicating liquors" in this section is dominant to make the prohibition of the Eighteenth Amendment uniformly effective wherever they are applicable. Johnson v. State (1921) 89 So. 114, 81 Fla. 783; Wood v. Whitaker (1921) 89 So. 118, 81 Fla. 653.

By treating liquors containing one-half of 1 per cent. of alcohol by volume and fit for use for beverage purposes as within the powers conferred on Congress by the Eighteenth Amendment the National Prohibition Act (incorporated in this title) does not transcend the powers so conferred. State of Rhode Island v. Palmer (N. J. 1920) 40 S. Ct. 486, 253 U. S. 350, 64 L. Ed. 946, affirming Christian Feigenspan, Inc., v. Bodine (D. C. 1920) 264 F. 186. It does not make a definition which may be declared arbitrary and unconstitutional by the courts, but one which it was within the reasonable discretion of Congress to make for the purposes of the act. Christian Feigenspan, Inc., v. Bodine (D. C. N. J. 1920) 264 F. 186, affirmed State of Rhode Island v. Palmer (1920) 40 S. Ct. 486, 253 U. S. 350, 64 L. Ed. 946.

"In so far as Congress, in aid of the general purpose of making possible the practical enforcement of prohibition, fixed a definite, maximum alcoholic content to 'nonintoxicating' beverages, it was acting clearly within its competency, and was proceeding in a way calculated to the attainment of the ultimate end in view and the successful performance of the duty imposed upon it by the constitutional amendment." U. S. v. Dodson (D. C. Cal. 1920) 268 F. 397.

3. State legislation.—Gen. St. Conn. 1918, § 2790, authorizing the sale of intoxicating liquor upon the issuance of a license, held invalid, in so far as it authorized the sale of liquor containing one-half of one per cent. or more of alcohol, but not in so far as it authorized the issuance of a license for the sale of liquor containing less than one-half of 1 per cent. of alcohol; and § 2792, providing that a licensed liquor dealer should not be convicted pending decision upon application for a renewal, held invalid in so far as it precluded a conviction for the sale of liquor containing one-half of 1 per cent., or more of alcohol. State v. Ceriani (1921) 113 A. 316, 96 Conn. 130.

Under Act La. No. 39 of 1921 (Ex. Sess.) § 8, providing that "liquor" or "intoxicating liquors" therein shall include alcohol, whisky, brandy, etc., and any spirituous, vinous, malt, or fermented liquor or liquids, by whatever name called, "as defined by federal legislation," and all alcoholic liquids, medicated, proprietary, or patented, fit for use as a beverage, or for intoxicating purposes, "all as defined by federal legislation," the quoted references to federal legislation have no application to liquors specifically named, and, if violative of Const. 1921, art. 3, § 18, are separable from the provision relative to the named liquors and do not render the statute as a whole unconstitutional, especially in view of this section. State v. Coco (1922) 92 So. 883, 152 La. 241.

The words "alcohol, brandy, whisky, rum, gin, and * * * any spirituous * * * liquor" of this section are included within the more compendious phrase, "distilled spirits," of the Massachusetts licensing statute (Rev. Laws, c. 100, § 2). Commonwealth v. Nickerson (1920) 128 N. E. 273, 236 Mass. 281, 10 A. L. R. 1568.

The amount of alcohol in the beverages sold under authority of a retail liquor license is not the test in Pennsylvania. If a licensee continued to sell liquors containing less than one-half of 1 per cent. of alcohol, he was not prohibited by the order or regulation of the federal authorities from engaging in business, and was therefore not entitled to the return of installments paid on account of license fees under Act May 8, 1919 (P. L. 167; Pa. St. 1920, §§ 13091–13093, 14082–14084). Petition of Riffle for Refund of License Fee (1920) 74 Pa. Super. Ct. 410.

The Sherwood Act (R. I.) though in terms by section 3 absolutely prohibiting the manufacture of intoxicating liquors, in view of definition of intoxicating liquors in section 1, and recognition in section 4, of right of person having permit, in conformity with the Volstead Act (in-

corporated in this title), to manufacture liquor, does not, any more than the Volstead Act, prohibit the manufacture of near beer with its necessary overalcoholization followed by dealcoholization in course of manufacture. O'Neil v. Demers (1922) 118 A. 677, 44 R. I. 504.

The Dean Act (Tex.) fixing the maximum percentage of alcohol in prohibited beverages at 1 per cent., is in conflict with this act, fixing the maximum percentage at one-half of 1 per cent., and must yield to it. Balaguer v. Macey (Tex. Civ. App. 1922) 238 S. W. 322.

4. Limitation of Act to beverage liquor.—Provisions of National Prohibition Act (section 17 of this title) limiting quantity of liquor to be taken internally that may be prescribed, apply only to beverage liquor in view of this section and other sections. Price v. Russell (D. C. Ohio, 1924) 296 F. 263.

5. Allegation and proof in general.—In a prosecution for the sale of wine and whisky, it is unnecessary either to allege or prove the alcoholic content or fitness for use as a beverage, as wine and whisky are prohibited by this section. Strada v. U. S. (C. C. A. Cal. 1922) 281 F. 143.

Where it is alleged in an indictment or information for a violation of this Act that "whisky" was sold, its fitness for beverage purposes, at least in a legal sense, need not be alleged nor proved. Hensberg v. U. S. (C. C. A. Mo. 1923) 288 F. 370; U. S. v. Jones (D. C. Ill. 1924) 298 F. 131.

6. Indictment and information.—See, also, notes to section 49 of this title.

Under section 49 of this title, it is not necessary in any indictment to include any defensive negative averment, and, even in absence of such statute, it is unnecessary to negative exceptions found in this section. McCarren v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 113.

Conviction under information charging sale and possession of intoxicating liquor consisting of "one drink of whisky" was supported by evidence showing sale of intoxicating bitters, since, under this section, it is sufficient to describe liquor as "intoxicating liquor," and transaction can be identified by parol to bar further prosecution for same act. Myers v. U. S. (C. C. A. N. Y. 1924) 3 F.(2d) 379.

An indictment for the unlawful possession of intoxicating liquor contrary to the National Prohibition Act (incorporated in this title) need not specify the particular kind of liquor possessed by accused; but a description of it as intoxicating liquor is sufficient in view of this section. Massey v. U. S. (C. C. A. Ark. 1922) 281 F. 293.

In view of provisions of Volstead Act (incorporated in this title), penal provisions of which Wright Act expressly adopts, pursuant to Const. U. S. Amend. 18, that phrase "intoxicating liquor" shall include alcohol, etc., "fit for * * * beverage purposes," and that possession is prima facie evidence of unlawful purpose, information under latter act need not allege that liquor was for beverage purposes. People v. Norcross (1925) 234 P. 438, 71 Cal. App. 2.

A complaint charging that defendant, without license and contrary to law, sold whisky containing 47 per cent. of alcohol by volume at 60° Fahrenheit, in violation of the Massachusetts licensing statute (Rev. Laws, c. 100) after the adoption of the Eighteenth Amendment to the federal Constitution, and the passage of the National Prohibition Act (incorporated in this title) was not defective, even if the part of the definition of intoxicating liquors in section 2 of the licensing statute, which fixed more than 1 per cent. of alcohol as the test in the absence of any other, has been superseded by the provisions of this section. Commonwealth v. Nickerson (1920) 128 N. E. 273, 236 Mass. 281, 11 A. L. R. 1568.

In an indictment charging the sale of "beer" and "wine," it is unnecessary to allege their alcoholic content or fitness for use as beverages, in view of the fact that in this section "it is provided that 'the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine. * * *' When it is alleged that a beverage is one of these well-known articles of commerce in common use it is unnecessary to allege or prove the alcoholic content or fitness for use as a beverage." U. S. v. McGuire (D. C. N. Y. 1924) 300 F. 98.

7. Judicial notice.—Court takes judicial notice that whisky is both distilled and intoxicating liquor. Williams v. U. S. (C. C. A. Tenn. 1925) 3 F.(2d) 933.

Courts judicially know that whisky, alcohol, brandy, gin and other well-known intoxicants are "intoxicant liquors." Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260.

Courts do not judicially know that home brew is "intoxicating liquor," within this section, in absence of proof of alcoholic content. Id.

Judicial notice may be taken that "cognac" is brandy, being distilled liquor with more than one-half of 1 per cent. alcohol. Benson v. U. S. (C. C. A. Tex. 1925) 10 F.(2d) 309.

Where a state statute provides that any definition of intoxicating liquor thereafter adopted by Congress shall be deemed a part of the state statute, the courts will take judicial notice of the congressional enactment of a definition. State v. Finsky (1922) 187 N. W. 201, 176 Wis. 481.

Judicial notice is taken that whisky is intoxicating, and where a witness testi-

fies that the liquor sold him was "moonshine whisky" proof of alcoholic content is not necessary. U. S. v. Percansky (D. C. Minn. 1923) 298 F. 991, writ of error dismissed Percansky v. U. S. (C. C. A. 1924) 5 F.(2d) 1020.

8. Evidence.—Evidence held not to show that home brew was of alcoholic content forbidden by this section. Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260.

In a prosecution for violation of this act by possessing or selling intoxicating liquor, proof that the liquor in question was whisky, and that it was in fact intoxicating, warrants the assumption that it contained more than one-half of 1 per centum of alcohol. Albert v. U. S. (C. C. A. Ohio, 1922) 281 F. 511.

That witnesses who testified that certain liquor was whisky were not in express terms shown to be familiar with the appearance, taste, smell, and effect of whisky held not to render their testimony incompetent for submission to the jury. Id.

To construe a violation of the Volstead Act (incorporated in this title) by selling beer, the liquid must be "beer" as defined in the act, and the opinion of government agents, who were not chemists, attempted no analysis, and established no expert qualifications to measure the alcoholic content of the liquid by drinking it, would afford no basis for a judgment of conviction. Berry v. U. S. (C. C. A. Ill. 1921) 275 F. 680.

"Whisky" will be presumed to be both a distilled and an intoxicating liquor. Rudner v. U. S. (C. C. A. Ohio, 1922) 281 F. 516, certiorari denied (1922) 43 S. Ct. 95, 260 U. S. 734, 67 L. Ed. 487; Hensberg v. U. S. (C. C. A. Mo. 1923) 288 F. 370.

Testimony of persons familiar with the taste and smell of whisky that a certain liquid was whisky is sufficient to establish the fact that it was intoxicating liquor, and it is not necessary to prove its alcoholic content. Stoecko v. U. S. (C. C. A. N. J. 1924) 1 F.(2d) 612.

Evidence of the sale of a "moonshine can" and six gallons of liquid for thirty dollars, was held sufficient to indicate the intoxicating character of the liquid, where it was treated as whisky throughout the trial. Miller v. U. S. (C. C. A. Ohio, 1924) 300 F. 529, certiorari denied (1924) 45 S. Ct. 123, 266 U. S. 624, 69 L. Ed. 474.

Alcohol is intoxicating liquor within the National Prohibition Act (incorporated in this title), and the fact need not be proved. Brown v. U. S. (C. C. A. Mass. 1926) 16 F.(2d) 682.

Evidence that defendant by separate agreements contracted to sell two barrels of whisky, delivered it as whisky, and received the price of two barrels of whisky, and that the purchaser, an admitted connoisseur, after drinking some of it, declared it was whisky, was not insufficient as matter of law to show that it was intoxicating, though there was no analysis, as whisky is a well-known intoxicating liquor of high alcoholic content, and the word, whenever used, has a definite and specific meaning. Singer v. U. S. (C. C. A. N. J. 1922) 278 F. 415, certiorari denied (1922) 42 S. Ct. 272, 258 U. S. 620, 66 L. Ed. 795.

That the content of bottles is intoxicating liquor is not required to be proved by a chemical analysis. Smith v. U. S. (C. C. A. S. C. 1924) 2 F.(2d) 715.

The effect of the definition of intoxicating liquor by this Act is to create a conclusive presumption that liquor containing alcohol in the proportions specified is intoxicating. State v. Gauthier (1922) 121 Me. 522, 118 A. 380, 26 A. L. R. 652.

9. Question for court or jury.—The court cannot say as a matter of law that liquor containing 2.75 per cent. alcohol by weight, or less, is intoxicating. Ex parte Finegan (D. C. N. Y. 1921) 270 F. 665.

Whether a purported medicinal preparation containing alcohol is capable of being used as beverage is a question of fact for the jury. State v. National Selright Assoc. (1921) 192 Iowa, 629, 185 N. W. 145, holding further that it is not conclusive that the "average person with average tastes" would not so use the preparation.

II. SUBD. (7). REGULATIONS

21. Power of Commissioner in general.—A decision or regulation of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, purporting to be made under authority of the National Prohibition Act (incorporated in this title), prohibiting the use of the words "Lager Bock or Stout" on labels for cereal beverages otherwise not within the act, held unauthorized and not enforceable as an attempt to amend and enlarge the act not within the power of an executive department. Oertel Co. v. Gregory, Dist. Atty. (D. C. Ky. 1921) 270 F. 789.

"The commissioner has the power to make regulations with the approval of the Secretary of the Treasury for carrying out the provisions of the National Prohibition Act [incorporated in this title], and judicial notice is taken of such a rule." In re Quirk (D. C. N. Y. 1924) 1 F.(2d) 484.

22. Regulations in general.—Section 30 of this title does not outlaw malt extract preparations, syrups, hops, and fruit juices, such as designated in Internal Revenue Regulation 60, except as they are advertised, designed, or intended for use in manufacture of intoxicants; and hence such regulation, making sale thereof unlawful, is not warranted by law, and a permit to a manufacturer, based on such regulation and not authorizing the manufacturing for sale or selling of such prep-

arations, would not make sale thereof violation of permit. Stroh Products Co. v. Davis (C. C. A. Mich. 1925) 8 F.(2d) 773.

23. Effect in Indian Territory.—Regulation promulgated by Commissioner of Internal Revenue, by virtue of his authority under this section, permitting possession and sale of Jamaica ginger is without effect in Indian territory because of sections 241 and 244 of Title 25, Indians, and Act March 1, 1895, c. 145, § 8 (omitted from Code). Ex parte Sharp (D. C. Okl. 1926) 13 F.(2d) 651, affirmed Sharp v. U. S. (C. C. A. 1926) 16 F.(2d) 876.

24. Permits.—Regulations promulgated under this section which authorizes the commissioner to make permits "in whole or in part" were held in Schnitzler v. Yellowley (D. C. N. Y. 1923) 290 F. 849, to be within the power granted, reasonable and valid.

Evidence that druggists knew or had reason to believe that whisky prescriptions which he filled were for beverage rather than medical purposes held to authorize forfeiture of his permit under section 21 of this title, and regulations of the commissioner under this section. O'Rourke v. Parker (D. C. Mass. 1926) 14 F.(2d) 191.

A contract for the sale and delivery of wine "for lawful use and under government permit," which provided for shipment by a certain date, provided the buyer furnish the necessary permits, did not refer to the basic permit required by the internal revenue regulations adopted pursuant to subdivision 7 of this section, but to the permit to purchase and transport the liquor which the holder of a basic permit may obtain thereunder. Ciocca-Lombardi Wine Co. v. Fucini (1923) 198 N. Y. S. 114, 204 App. Div. 392, affirmed (1923) 142 N. E. 293, 236 N. Y. 584.

In equitable proceeding against government to reinstate permits for use of alcohol for manufacturing purposes under sections 14 and 21 of this title, the government should plead clearly and specifically the derelictions on which it relies to justify and sustain the revocation, in view of subdivision 7 of this section. McGill v. Mellon (D. C. Mass. 1925) 5 F.(2d) 262.

25. Indictment.—Indictment, under Rev. St. Mo. 1919, § 6588, as amended by Laws 1921, p. 414, § 1, for selling Jamaica ginger, need not charge that it was sold contrary to order made by Treasury Department construing Volstead Act (incorporated in this title), which order permits sale of Jamaica ginger, double strength, declaring such liquor to be unfit for use as beverage. State v. Tatman (Mo. App. 1927) 291 S. W. 151.

26. Evidence.—Evidence that druggist knew or had reason to believe that whisky prescriptions which he filled were for beverage rather than medical purposes was held to authorize forfeiture of his permit under section 21 of this title and regulations of the commissioner under subdivision 7 of this title. O'Rourke v. Parker (D. C. Mass. 1926) 14 F.(2d) 191.

§ 5. Authority of commissioner's agents or assistants. Any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose. Records required to be filed with the commissioner may be filed with an assistant commissioner or other person designated by the commissioner to receive such records. (Oct. 28, 1919, c. 85, Title II, § 1, 41 Stat. 307.)

Cross-References

The portion of the original text of this section omitted here is incorporated in section 4 of this title.

Notes of Decisions

1. Authority of prohibition agents.—Prohibition agents, acting under delegated authority of Commissioner of Internal Revenue, pursuant to this section, section 45 of this title and National Prohibition Act, Title I, § 2 (temporary) have authority to take samples for analysis of insecticide manufactured by holder of permit to use denatured alcohol. Blackman v. Mellon (D. C. N. Y. 1924) 5 F.(2d) 987.

Under this section, search warrant may be issued to federal prohibition agent as assistant or agent of Commissioner of Internal Revenue. U. S. v. Syrek (D. C. Mass. 1923) 290 F. 820.

General prohibition agent is a "civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof," within section 616 of Title 18, Criminal Code and Criminal Procedure, providing for issuance of search warrant to such an officer, notwithstanding Const. art. 2, § 2, providing for appointment of officers by the President and the Senate, the President alone, the courts of law, or the heads of departments, in view of this section and other sections. Steele v. U. S. (N. Y. 1925) 45 S. Ct. 417, 267 U. S. 505, 69 L. Ed. 761.

The provision in this section that "any act authorized to be done by the commissioner may be performed by any assistant or agent designated by him for that purpose," and other provisions of the act

and its amendment, enlarge the provisions of section 616 of Title 18, Criminal Code and Criminal Procedure, relating to the officials to whom a search warrant may be issued and include the agent and assistants appointed by the Commissioner of Internal Revenue for the enforcement of the provision of the act. Keehn v. U. S. (C. C. A. R. I. 1924) 300 F. 493.

2. Parties to actions.—Under this section providing that any act authorized to be done by the Commissioner may be performed by any assistant, or any one designated by him for that purpose, the local prohibition director, who refused an application for a permit, is a proper party defendant and the only necessary party to a proceeding in equity under section 16 of this title, to review the decision. Lacks v. Mitchell (D. C. Cal. 1921) 278 F. 393.

In view of this section, Commissioner of Internal Revenue and Prohibition Commissioner, residing in Washington, are not necessary parties to suit in equity under sections 14 and 21 of this title to review order of Prohibition Director for state revoking drug store permit. O'Sullivan v. Potter (D. C. Mass. 1923) 290 F. 844.

CHAPTER 2.—PROHIBITION OF INTOXICATING BEVERAGES

Sec.

11. Investigation and report of violations of chapter; duty to prosecute; search warrants.
12. Manufacture, sale, transportation, importation or exportation, delivery, furnishing, or possessing intoxicating liquors prohibited; exceptions.
13. Articles exempt from provisions of chapter; permits to manufacture; quantity of alcohol; sale of enumerated articles for beverage purposes; punishment.
14. Analysis of manufactured articles; notice to manufacturer; revocation of permit.
15. Change of formula of preparations being used as beverage or for intoxicating beverage purposes.
16. Permits to manufacture, sell, purchase, transport, or prescribe liquors; exceptions; expiration of permits; wine for sacramental purposes.
17. Physicians' prescriptions.
18. Kinds of liquor which may be prescribed; percentage of alcohol in; quantity permitted to be prescribed.
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20. Number of blanks issued to physician within given period.
21. Violations of law by permittee; citation; hearing; revocation of permit.
22. Record of manufacture, purchase, sale, or transportation of liquor.
23. Copies of permits to be kept by manufacturers and wholesalers; sales only at wholesale.
24. Labels on containers.
25. Shipments of liquor; records of carriers; delivery; verification of copies of permits.
26. Notice to carrier of nature of shipments; information on packages.
27. Consigning, shipping, transporting, delivering, or receiving packages with false statements thereon.
28. Orders to carrier for delivery to persons not actual bona fide consignees.
29. Advertising liquor or manufacture, sale, or keeping for sale thereof; exceptions.
30. Advertising, manufacture, or sale of utensils, apparatus, ingredients or formulæ for manufacture of liquor.
31. Soliciting or receiving orders for liquor.
32. Right of action for injuries caused by intoxicated person.
33. Property used in connection with violation of law as common nuisance; punishment for maintenance; liability of owners of buildings.
34. Abatement of nuisance; injunction; procedure; bond by owner or lessee of building.
35. Person keeping or carrying liquor with intent to sell, or soliciting orders for liquor guilty of nuisance and restrainable by injunction.
36. Fees of officers.
37. Forfeiture of lease at option of lessor.
38. Violation of injunction as contempt; procedure; punishment.
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43. Limitation on use; appropriations for expense of maintenance, etc., report in Budget as to vessels or vehicles; disposition when not needed for official use.
44. Delivery of seized liquors to United States for certain purposes.
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63. Prohibition of intoxicating liquors in Canal Zone.
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Section 11. Investigation and report of violations of chapter; duty to prosecute; search warrants. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this chapter* to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 591 of Title 18 is hereby made applicable in the enforcement of this chapter. Officers mentioned in said section 591 are authorized to issue search warrants under the limitations provided in sections 611 to 631, and 633 of Title 18. (Oct. 28, 1919, c. 85, Title II, § 2, 41 Stat. 308.)

* It would seem that the words "this chapter" which are a translation of the words "this act" in the original text, should be "this title" or "this chapter and chapter 3 of this title."

Notes of Decisions

1. Application in general.—This section does not, and was not intended to, cover violations of section 203 of Title 26, Internal Revenue. Bullock v. U. S. (C. C. A. Ky. 1923) 289 F. 29.

2. Arrests.—In view of this section, prohibition officer had power to arrest defendants, engaged in manufacturing liquor, after entry through premises not occupied by defendant. Rouda v. U. S. (C. C. A. N. Y. 1926) 10 F.(2d) 916.

The arrest of a person, on his making an illegal sale of liquor to a prohibition agent in a store, without a warrant, held legal. Cabitt v. Potter (D. C. Mass. 1923) 293 F. 54.

Under this section and section 591 of Title 18, Criminal Code and Criminal Procedure, a warrant for a violation of the Volstead Act (incorporated in this title) may be issued to a municipal police officer. Harris v. Superior Ct. (1921) 196 P. 895, 51 Cal. App. 15.

Under the provision in this section that section 591 of Title 18, Criminal Code and Criminal Procedure, shall be applicable in its enforcement, only state officers who are authorized to make arrests under the latter act can make arrests

under the Volstead Act (incorporated in this title); such officers being empowered to issue warrants, and it not being intended that they should do the actual arresting. Lenski v. O'Brien (1921) 232 S. W. 235, 207 Mo. App. 224.

3. Searches and search warrants—In general.—See, also, notes to section 39 of this title.

This section authorizes the issuance of search warrants for violation of the Prohibition Act (incorporated in this title) which are misdemeanors only, though section 612 of Title 18, Criminal Code and Criminal Procedure, provides for search warrants under that act only in case of felonies. U. S. v. Friedman (D. C. Pa. 1920) 267 F. 856.

Prohibition agents had the right to enter the premises of a brewery and examine the excisable products, to determine whether there was compliance with conditions of permit that brewery would not violate any of the provisions of the National Prohibition Act (incorporated in this title) or regulations promulgated thereunder, or any other laws of the United States respecting liquors, and could without a search warrant examine beer and seize it, where it contained more than one-half of 1 per cent. of alcohol, such seizure not being unreasonable under Const. Amend. 4, especially in view of this section. U. S. v. Westmoreland Brewing Co. (D. C. Pa. 1923) 294 F. 735, affirmed Westmoreland Brewing Co. v. U. S. (C. C. A. Pa. 1923) 294 F. 740, certiorari denied (1924) 44 S. Ct. 231, 263 U. S. 722, 68 L. Ed. 525.

Whether an affidavit is filed and a search warrant issued under section 591 of Title 18, Criminal Code and Criminal Procedure, or under the Act of June 15, 1917 (section 611, et seq., of Title 18, Criminal Code and Criminal Procedure) the contents of each must be the same. U. S. v. Rykowski (D. C. Ohio, 1920) 267 F. 866.

4. —— Affidavit.—A search warrant cannot be issued under section 1195 of Title 26, Internal Revenue, based on information and belief of affiant; a federal prohibition agent, as those employed to enforce the National Prohibition Act (incorporated in this title) are not internal revenue officers, and are limited to the means of search provided for by that act, in view of this section and section 39 of this title. U. S. v. Spencer (D. C. Pa. 1923) 292 F. 871.

Under the provision in this section that officers mentioned in section 591 of Title 18, Criminal Code and Criminal Procedure, can issue search warrants under the limitations of Act June 15, 1917, c. 30 (sections 611 et seq. of Title 18, Criminal Code and Criminal Procedure) an affidavit that affiant has reason to believe and does believe that a still is being conducted on certain premises is insufficient, either under section 591 or the act of 1917; it being necessary that the affidavit state the facts showing probable cause for issuing the search warrant, or that the commissioner hear evidence to determine such cause. U. S. v. Rykowski (D. C. Ohio, 1920) 267 F. 866.

5. —— Issuance of warrant.—Search warrant issued by judge of state municipal court held insufficient basis for federal search and seizure in view of this section. Byars v. U. S. (Iowa, 1927) 47 S. Ct. 248, 71 L. Ed. ——, reversing (C. C. A. 1925) 4 F.(2d) 507.

6. —— Service of warrant.—Under this section and section 616 of Title 18, Criminal Code and Criminal Procedure, a prohibition agent regularly appointed by Commissioner of Internal Revenue has power and authority to serve search warrant. Dumbra v. U. S. (N. Y. 1925) 45 S. Ct. 546, 268 U. S. 435, 69 L. Ed. 1032. To the same effect, see U. S. v. McKay (D. C. Nev. 1924) 2 F.(2d) 257; U. S. v. O'Connor (D. C. Ala. 1924) 294 F. 584; U. S. v. Keller (D. C. Mich. 1923) 288 F. 204.

General prohibition agent is a "civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof," within section 616 of Title 18, Criminal Code and Criminal Procedure, providing for issuance of search warrant to such an officer, notwithstanding Const. art. 2, § 2, providing for appointment of officers by the President and the Senate, the President alone, the courts of law, or the heads of departments. Steele v. U. S. (N. Y. 1925) 45 S. Ct. 417, 267 U. S. 505, 69 L. Ed. 761; Boehm v. U. S. (C. C. A. Ill. 1925) 6 F.(2d) 497; Leonard v. U. S. (C. C. A. Mass. 1925) 6 F.(2d) 353. Under this section and sections 4, 5 and 45 of this title and section 1195 of Title 26, Internal Revenue, search warrant may be issued to federal prohibition agent as assistant or agent of Commissioner of Internal Revenue. U. S. v. Syrek (D. C. Mass. 1923) 290 F. 820. See, to the contrary, U. S. v. Musgrave (D. C. Neb. 1923) 293 F. 203.

Warrant for search of a brewery is valid, though addressed to, and executed by, a prohibition agent; such an agent being a "civil officer" within Const. art. 2, § 2, and provision of Espionage Act (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure) incorporated in National Prohibition Act providing for enforcement of prohibition law by civil officers. Daeufer-Lieberman Brewing Co. v. U. S. (C. C. A. Pa. 1925) 8 F.(2d) 1.

One effect of this section is to grant power to issue search warrants under the limitations provided in section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, to other officers in addition to those named in those sections. U. S. v. Friedman (D. C. Pa. 1920) 267 F. 856.

7. —— Review of proceedings.—Certiorari is not available to review proceeding of United States commissioner in issuing a search warrant at instance of relator, who claims that there was no showing of probable cause to believe that petition was violating National Prohibition Act (incorporated in this title) and that warrant directed search and seizure of documents not particularly described, since relator's remedy under section 591 of Title 18, Criminal Code and Criminal Procedure, and this section and section 611, et seq. of Title 18, Criminal Code and Criminal Procedure, is right to controvert grounds on hearing before commissioner and proceedings for restoration of property seized if not prescribed in warrant or if there was no probable cause. U. S. v. Elliott (C. C. A. Wash. 1925) 5 F.(2d) 292, affirming (D. C. 1924) 3 F.(2d) 496.

8. Seizures.—Claimant of property, seized for violation of National Prohibition Act (incorporated in this title) may, after unreasonable delay in bringing forfeiture proceeding, bring action for abandonment of seizure or return of property in view of this section. Church v. Goodnough (D. C. R. I. 1926) 14 F.(2d) 432.

In view of this section, only officers of United States may seize automobile, used in transporting intoxicating liquors, under section 40 of this title. U. S. v. Loomis (C. C. A. Wash. 1924) 297 F. 359.

This section does not authorize the commissioner to return property wrongfully seized as provided in section 626 of Title 18, Criminal Code and Criminal Procedure; such provision being superseded as to such seizures by section 39 of this title, providing that property seized thereunder "shall be subject to such disposition as the court may make thereof." In re Alpern (D. C. N. Y. 1922) 280 F. 432.

9. Manner and form of prosecutions.—This act does not require prosecutions for violation thereof, which are misdemeanors not infamous, to be prosecuted by indictment alone, though this section authorizes the Commissioner of Internal Revenue to conduct the prosecution at the committing trial to have the offenders held for the action of a grand jury. U. S. v. Achen (D. C. N. Y. 1920) 267 F. 595.

Notwithstanding the provision of this section, requiring United States commissioners or other officers, or courts authorized to issue warrants, to conduct the committing trial for the purpose of having offenders held for the action of a grand jury, sections 46 and 49 of this title, referring to affidavits, informations, or indictments clearly contemplate that prosecutions under the act may be by information as well as by indictment so that a prosecution for the first offense of selling liquor which by section 46 of this title is punishable by imprisonment not exceeding six months without provision for sentence for hard labor, so that it is a statutory misdemeanor under section 541 of Title 18, Criminal Code and Criminal Procedure, may be by information. Cleveland v. Mattingly (1923) 287 F. 948, 52 App. D. C. 374, certiorari denied (1923) 43 S. Ct. 521, 262 U. S. 744, 67 L. Ed. 1211.

§ 12. Manufacture, sale, transportation, importation or exportation, delivery, furnishing, or possessing intoxicating liquors prohibited; exceptions. No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter,* and all the provisions of this chapter* shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: *Provided,* That nothing in this chapter* shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts. (Oct. 28, 1919, c. 85, Title II, § 3, 41 Stat. 308.)

* See the starred note to section 11 of this title.

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I. IN GENERAL

1. Validity.—The provision of this section, making it unlawful to have possession of intoxicating liquor, except as authorized by the act, is constitutional, U. S. v. Murphy (D. C. N. Y. 1920) 264 F. 842; Rose v. U. S. (C. C. A. Ohio, 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed. 419; Page v. U. S. (C. C. A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S. Ct. 461, 258 U. S. 627, 66 L. Ed. 799; Massey v. U. S. (C. C. A. Ark. 1922) 281 F. 293; Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260; though the liquor was lawfully acquired before the effective date of the eighteenth amend-

ment, Rose v. U. S. (C. C. A. Ohio, 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed. 419.

It is not unconstitutional, as going beyond the scope of the Eighteenth Amendment. Gatterdam v. U. S. (C. C. A. Ky. 1925) 5 F.(2d) 673; Jordan v. U. S. (C. C. A. Idaho, 1924) 299 F. 298.

Const. U. S. Amend. 18, conferred on Congress power to make possession of intoxicating liquors for beverage purposes a criminal offense, as was done by this section and sections 39 and 50 of this title. Riggs v. U. S. (C. C. A. W. Va. 1926) 14 F.(2d) 5, certiorari denied (1926) 47 S. Ct. 110, 71 L. Ed. ——.

The prohibition of the transportation of liquor for beverage purposes except by permittees, is valid under Amendment 18. Corneli v. Moore (D. C. Mo. 1920) 267 F. 456, affirmed (1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332.

If the provision in this section, that the act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented, is in excess of legislative power the whole act is not thereby unconstitutional, as such provision can be disregarded. Rose v. U. S. (C. C. A. Ohio, 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed. 419.

2. Time of taking effect of section.—Under § 21 of title III of this act (omitted as temporary and executed), this section took effect on January 17, 1920, the day after the 18th amendment took effect, so that an indictment charging violation January 16, 1920, must be quashed. Zimmerman v. U. S. (C. C. A. Ill. 1921) 277 F. 865.

3. Conflict with state laws.—See, also, notes to section 1 of this title.

Mass. St. 1923, c. 370, prohibiting transportation of intoxicating liquor by air craft, water craft, or vehicle, held not in conflict with this section, prohibiting general transportation of intoxicating liquors. Commonwealth v. Dzewiacin (1925) 147 N. E. 582, 252 Mass. 126.

4. Repeals.—See, also, notes to sections 3 and 52 of this title.

R. S. § 3005 (repealed), was repealed in so far as it permitted the transportation of intoxicating liquors intended for beverage purposes, by this section, prohibiting the transportation of intoxicating liquors for beverage purposes, and section 52 of this title, repealing laws inconsistent with the provisions of this act. Anchor Line (Henderson Bros.) v. Aldridge (D. C. N. Y. 1921) 280 F. 870.

Notwithstanding the Eighteenth Amendment and the provisions of this section, and sections 16 and 22 of this title, declaring that transportation of liquor shall be unlawful, except as provided, etc., and section 40 of this title, providing for the seizure of a vehicle used for transportation of intoxicants, etc., sections 1181 and 1182 of Title 26, Internal Revenue, providing for the confiscation of any vehicle used for removal of untaxed liquors, is not, in view of section 52 of this title, and, being entirely consistent with the Prohibition Act (incorporated in this title) forfeiture may be decreed thereunder for transportation of untaxed liquors, notwithstanding the party transporting was guilty also of another offense. U. S. v. One Essex Touring Automobile (D. C. Ga. 1920) 266 F. 138.

The provision of this section, prohibiting possession of intoxicating liquor, except as authorized by the act, but imposing no penalty, except the general penalty of section 46 of this title, did not impliedly repeal or supersede R. S. § 3082 (later specifically repealed), prohibiting the receiving and concealing of goods imported contrary to law since to receive means simply the act of taking, and to conceal means to hide or withdraw from observation, to prevent discovery, so that possession is not necessarily an incident of receiving and concealing. U. S. v. Bookbinder (D. C. Pa. 1922) 281 F. 207. But see U. S. v. Dowling (D. C. Fla. 1922) 278 F. 630.

The Eighteenth Amendment and this section, and section 46 of this title, prohibiting the sale of liquors for beverage purposes and prescribing the penalty for its violation, by making dealing in liquor unlawful, by implication repealed the provisions of the internal revenue laws imposing a tax on liquor dealers, and a person who has been convicted and fined for the sale of liquor under the Prohibition Act (incorporated in this title) cannot, in addition, be subjected to the penalties prescribed for carrying on the business of a retail liquor dealer without paying the special tax therefor. Ravitz v. Hamilton (D. C. Ky. 1921) 272 F. 721. And section 193 of Title 26, Internal Revenue, prescribing the punishment for unlawfully carrying on the business of a retail liquor dealer without paying a special tax, is repealed by implication by this act, which, in this section covers the whole field notwithstanding section 52 of this title, providing that the regulations therein shall be construed as in addition to existing laws, that such act shall not relieve any one from paying any taxes or charges on the manufacture or traffic in liquor, and that the payment of the tax or penalty therein prescribed shall give no right to engage in the manufacture or sale, nor shall the act relieve any person from any civil or criminal liability. Farley v. U. S. (C. C. A. Wash. 1921) 269 F. 721.

While this section provides that intoxicating liquor for nonbeverage purposes may be manufactured only as provided, yet, as section 52 of this title, saved

laws not inconsistent therewith, section 281 of Title 26, Internal Revenue, requiring the registration of stills with the commissioner, was not repealed. U. S. v. Sohm (D. C. Mont. 1920) 265 F. 910.

Since the prohibition of importation of intoxicating liquor under this section does not apply to all intoxicating liquor, this act did not repeal the Tariff Act of October 3, 1913 (since expressly repealed) levying customs duties upon the importation of distilled spirits and wines, nor the provisions of law for the declaration and entry of intoxicating liquor. U. S. v. Bookbinder (D. C. Pa. 1922) 281 F. 206.

5. Construction in general.—The liberal construction of this act enjoined by this section does not justify the court in extending the prohibitive provisions of the act beyond what is plainly stated, nor in omitting language which would change its plain meaning. U. S. v. Cronen (D. C. Pa. 1920) 264 F. 459.

The provision in this section that the act shall be liberally construed, etc., will not be construed to permit the removal of whisky stored in warehouses for beverage purposes, unless such construction is too clear for reasonable dispute. Cornell v. Moore (D. C. Mo. 1920) 267 F. 456, affirmed (1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332.

"Here, in unequivocal language, we have a declaration on the part of Congress that, however this act may be viewed, and tested by every means known to those whose duty and function it is to construe statutes, in every instance the statute 'shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.' Nothing can be plainer than that, and it seems to me that Congress there, as it might properly do, has said that the courts shall not seek to construe the statute so as to permit the use of intoxicating liquors as a beverage, but that they shall use all reasonable means to construe it so as to prevent such use." U. S. v. Dodson (D. C. Cal. 1920) 268 F. 397.

6. Exceptions.—The exception in this section is merely in keeping with, and in recognition of, other specific provisions in the act permitting the manufacture, sale, possession, etc., of "intoxicating liquor" for certain nonbeverage purposes, such as sacramental, medicinal, etc., and for its possession in private dwellings only (section 39 of this title), for beverage purposes. It is in no wise inconsistent with, or counter to, the general purpose of the act. U. S. v. Dodson (D. C. Cal. 1920) 268 F. 397.

7. Alien offenders.—Orders of deportation held sustained by evidence that alien before entry was avowed and persistent violator of prohibition laws. Ex parte Riley (D. C. Me. 1926) 17 F.(2d) 646.

Evidence showing that alien, who had previously been convicted of violation of National Prohibition Act section 1 et seq. of this title, and while out on bail pending deportation proceedings had gone to Canada, and, on being denied right to return, had made surreptitious entry, held to warrant deportation. Riley v. Howes (D. C. Me. 1927) 17 F.(2d) 647.

Violation of National Prohibition Act (incorporated in this title) is offense involving "moral turpitude" as respects deportation of alien. Id.

Alien held not subject to deportation because of conviction of manufacturing wine within five years previously. Skrmetta v. Coykendall (D. C. Ga. 1926) 16 F.(2d) 783.

Alien convicted of possession of liquor in violation of this act during period of probation held not eligible to citizenship. In re Raio (D. C. Tex. 1924) 3 F.(2d) 78.

Alien convicted of manufacturing liquor in violation of this act, during period of probation held not eligible to citizenship. In re Nagy (D. C. Tex. 1924) 3 F.(2d) 77.

8. Arrests.—In view of this section and other sections prohibition officer had power to arrest defendants, engaged in manufacturing liquor, after entry through premises not occupied by defendant. Rouda v. U. S. (C. C. A. N. Y. 1926) 10 F.(2d) 916.

9. Civil actions.—Under this section and section 50 of this title, making the possession of intoxicating liquors, except under particular circumstances specified therein, unlawful, a complaint for conversion of whisky on October 7, 1920, which did not allege facts showing that possession was lawful held insufficient to state a cause of action. Lennox v. Meehan (1923) 201 N. Y. S. 710, 121 Misc. Rep. 678.

10. Conviction as affecting credibility.—Failure in murder prosecution to instruct that defendant's conviction and violation of federal prohibition law (incorporated in this title) went only to his credibility held not erroneous, in absence of request therefor. State v. Aurentz (Mo. 1926) 286 S. W. 69.

Conviction for violation of National Prohibition Act (incorporated in this title) might not be shown to affect credit of witness, where term of imprisonment was not shown. Laukaitis v. Klikna (Conn. 1926) 132 A. 913, 104 Conn. 355.

11. Disbarment.—Attorney's manufacture of beer in violation of National Prohibition Act (incorporated in this title) was held misdemeanor involving moral turpitude, warranting disbarment for three years. In re Bartos (D. C. Neb. 1926) 13 F.(2d) 138.

12. Importations.—In view of the provisions of this section that liquors for nonbeverage purposes may be imported, intoxicating liquors and the bottles containing such liquors are dutiable only

when imported in compliance with the regulations of the Commissioner of Internal Revenue. (1921) 32 Op. Atty. Gen. 404.

Liquors which are prohibited importation, but which are properly listed as sea stores on American vessels arriving in ports of the United States, may be required to be placed under seal by the boarding officer and kept sealed during the entire time of the vessel's stay in port, no part thereof to be removed from under seal for use by the crew at meals or for any other purpose. (1920) 32 Op. Atty. Gen. 96.

13. Libel and slander.—Newspaper articles relating to defendant's arrest for transporting smuggled liquor held under evidence to be a fair, true, and impartial account of official proceedings respecting matter of public concern. Express Pub. Co. v. Keeran (1926) 284 S. W. 913, reversing (Civ. App. 1925) 274 S. W. 335.

14. Permits.—See, also, notes to section 16 of this title.

In view of purpose expressed in this section to prevent use of intoxicating liquor as beverage, retail druggist's permit was properly revoked on showing that over third of prescriptions filled by him were forged or counterfeit, despite his claim that they were accepted in good faith, that his clerks filled some of them, and that he did a large business. Goldberg v. Yellowley (D. C. N. Y. 1923) 290 F. 389.

In view of provision of this section, for liberal construction of act to prevent use of intoxicating liquor as beverage, retail druggist's failure to see that his permit to sell is not used to violate act warrants its revocation under section 21 of this title. Schnitzler v. Yellowley (D. C. N. Y. 1923) 290 F. 849.

Under this section and other sections of this title and sections 1110, 1120, and 1124 of Regulations 60, Revised March, 1924, relating to withdrawal of wine for sacramental purposes, priest, who did not hold permit to purchase wine at time of hearing, held not entitled to enjoin Prohibition Director and other federal officers from interfering with his procurement of wine for sacramental and like religious rites, pending investigation. Gardner v. Mellon (C. C. A. Cal. 1925) 5 F.(2d) 954.

Under this section, and sections 16 and 23 of this title, manufacturers and wholesale druggists only are authorized to sell liquor at wholesale. And a jobber is not entitled to a permit to withdraw whisky from bond for sale to druggists. Small Grain Distilling & Drug Co. v. Hamilton (C. C. A. Ky. 1921) 276 F. 544.

15. Police pensions.—Under Act Sept. 1, 1916, § 12 (local) possession and transportation of intoxicating liquor in violation of this section by a retired police officer who is subject to call, is a crime involving moral turpitude, commission of which is ground for discontinuance of pension, regardless of whether crime be a first or subsequent offense. Rudolph v. U. S. ex rel. Rock (1925) 6 F.(2d) 487, 55 App. D. C. 362, certiorari denied U. S. ex rel. Rock v. Rudolph (1925) 46 S. Ct. 20, 269 U. S. 559, 70 L. Ed. 411.

16. Seizures and forfeitures.—See, also, notes to section 40 of this title, and sections 483, 486, 487, 495, 497 and 498 of Title 19, Customs Duties.

Statutes relating to bonding of vessel seized for violation of revenue and prohibition laws are mandatory, irrespective of prior seizures. The California (D. C. N. Y. 1926) 12 F.(2d) 270.

In libel of information to forfeit tug, allegation that tug transported liquor when loaded on lighter held sufficient; such transportation being prohibited, under this section. The Esther M. Rendle (C. C. A. Mass. 1925) 7 F.(2d) 545 reversing (D. C. 1925) 5 F.(2d) 1007.

Despite section 50 of this title, intoxicating liquors seized in near-beer saloon under an illegal search warrant will be returned to proprietor, though criminal proceedings against him have been terminated, where the only evidence that the liquor was contraband when seized, and will be, if returned, unlawfully possessed, under this section and section 39 of this title, is that illegally obtained in violation of Const. Amend. 4. Geraghty v. Potter (D. C. Mass. 1925) 5 F.(2d) 366, order vacated Potter v. Geraghty (1926) 47 S. Ct. 235, 71 L. Ed. ——.

Seizures and libels under treaty between Great Britain and the United States of May 22, 1924, in which Great Britain agrees to make no objection to the boarding and seizure of private vessels violating United States' laws within one hour's sailing distance of coast, were held authorized as against objection that Congress has not by law declared acts denounced by this section and various other sections, to be crimes when committed beyond 3 and 12 mile limits. The Pictonian (D. C. N. Y. 1924) 3 F.(2d) 145.

Manifesting intoxicating liquor as "ship's stores," under R. S. § 2809 (repealed), and their surrender to the customs officers did not render them subject to forfeiture under this section, and sections 16 and 40 of this title, though they should have been reported under R. S. § 2774 (repealed). U. S. v. Two Hundred and Fifty-Four Bottles of Intoxicating Liquor (D. C. Tex. 1922) 281 F. 247.

Possession of intoxicating liquors on the high seas by captain of a vessel owned and operated for the account of the United States Shipping Board Emergency Fleet Corporation was illegal, and they were subject to forfeiture under this section, and sections 16 and 40 of this title; the

ship being a part of the territory of the United States. Id.

Acquittal for violation of National Prohibition Act (incorporated in this title) has been held res judicata of libel for seizure of vessel and liquor cargo. U. S. v. 2,180 Cases of Champagne (C. C. A. N. Y. 1926) 9 F.(2d) 710. Contra, U. S. v. 2,180 Cases of Champagne and Other Intoxicating Liquors (D. C. N. Y. 1925) 4 F.(2d) 735.

Conviction for possessing liquor has been held not to bar proceedings for forfeiture of automobile for concealing therein tax-unpaid liquor to evade tax. Commercial Credit Co. v. U. S. (C. C. A. Wash. 1927) 17 F.(2d) 902.

Counterfeit bond strip label stamps seized by federal agents following lawful arrest of defendant for unlawful sale of intoxicating liquors, in violation of this section, could be used as evidence, notwithstanding Const. Amends. 4 and 5, in prosecution for having possession of such stamps in violation of section 417 of Title 26, Internal Revenue, since government was in possession rightfully. U. S. v. Seltzer (D. C. Mass. 1925) 5 F.(2d) 364.

17. Territorial operation of act.—See, also, notes to section 2 of this title.

In view of this section and other sections, the National Prohibition Act (incorporated in this title) is operative throughout the territorial limits of the United States, subject only to the exception with respect to the Panama Canal and Panama Railroad contained in section 63 of this title and applies to all merchant vessels, whether foreign or domestic, when within the territorial waters of the United States, but does not apply to domestic vessels, when outside such waters. Cunard S. S. Co. v. Mellon (N. Y. 1923) 43 S. Ct. 504, 262 U. S. 100, 67 L. Ed. 894, 27 A. L. R. 1306, affirming (D. C. 1922) 284 F. 890, reversing International Mercantile Marine v. Stuart (D. C. 1922) 285 F. 79.

18. Warehouse certificates.—This section prohibits any burdensome regulation on dealing in warehouse certificates covering distilled spirits in government warehouses. Landen v. U. S. (C. C. A. Ohio, 1924) 299 F. 75.

II. OFFENSES AND DEFENSES

41. Offenses in general.—Charge of trafficking in unlawfully imported liquor drawn under Tariff Act, held not sustainable under National Prohibition Act (incorporated in this title). Hartson v. U. S. (C. C. A. N. Y. 1926) 14 F.(2d) 561.

Where intoxicating liquors are carried by vessels through the territorial waters of the United States and brought into its ports and harbors, such carrying constitutes "transportation" and "importation" prohibited by the Prohibition Amendment and the National Prohibition Act (incorporated in this title) though such liquors are carried only as sea stores. Cunard S. S. Co. v. Mellon (N. Y. 1923) 43 S. Ct. 504, 262 U. S. 100, 67 L. Ed. 894, 27 A. L. R. 1306, affirming decrees (D. C. 1922) 284 F. 890, reversing International Mercantile Marine v. Stuart (D. C. 1922) 285 F. 79.

The transshipment of intoxicating liquor from one British ship to another in New York harbor is prohibited by the provisions of U. S. Const., 18th Amendment and this section. Anchor Line v. Aldridge (N. Y. 1922) 259 U. S. 80, 42 S. Ct. 423, 66 L. Ed. 836, 22 A. L. R. 1116, affirming (D. C. N. Y. 1921) 280 F. 870.

The eighteenth amendment and this section, liberally construed under the terms of this section were held to prohibit the transportation of intoxicating liquor across the United States from Canada to Mexico, or the transshipment of such liquor from one British ship to another, while within a port of the United States, notwithstanding R. S. § 3005, as amended (repealed), permitting merchandise arriving in any domestic port destined to a foreign port to be conveyed through the territory of the United States without payment of duties, and article 29 of the Treaty with Great Britain of May 8, 1871, permitting merchandise arriving at certain ports destined to British possessions in North America to be conveyed across the United States without payment of duties, especially in view of the express permission by section 63 of this title, for transportation through the Canal Zone. Grogan v. Hiram Walker & Sons (Mich. 1922) 42 S. Ct. 423, 259 U. S. 80, 66 L. Ed. 836, 22 A. L. R. 1116, reversing decree Hiram Walker & Sons v. Lawson (D. C. 1921) 275 F. 373.

National Prohibition Act (incorporated in this title) does not bar prosecution for unlawful importation or concealment of intoxicating liquors fit for beverage purposes, in view of section 231 of Title 19, Customs Duties, defining merchandise to include prohibited merchandise. Nounes v. U. S. (C. C. A. Tex. 1925) 4 F.(2d) 833, certiorari denied (1925) 45 S. Ct. 513, 268 U. S. 695, 69 L. Ed. 1162.

Where keeper of dance hall and saloon kept quantities of whisky and beer on hand, which from time to time was sold by his employees to frequenters of the place, held, such keeper and employees were chargeable with offenses of both possession and sale of intoxicating liquor. Kennedy v. U. S. (C. C. A. Nev. 1925) 4 F.(2d) 488.

The National Prohibition Act (incorporated in this title) does not absolutely prohibit the manufacture and sale of intoxicating liquors, but under this section, liquor for nonbeverage purposes, such as for medicinal and sacramental purposes, may be manufactured, sold, and transported under a permit issued by Commissioner of Internal Revenue. U. S. v. Skil-

ken (D. C. Ohio, 1923) 293 F. 916, affirmed Skilken v. U. S. (C. C. A. 1923) 293 F. 923.

In a prosecution under this section charging the unlawful possession of intoxicating liquors and the unlawful transportation of such liquors from Louisville to Kansas City Junction, evidence that the defendant met an unknown person, who stepped off a train with suitcases containing liquor, and assisted in carrying the suitcases to defendant's automobile, was held sufficient to sustain a conviction for unlawful "possession," but not for transporting the liquor from another state. Broens v. U. S. (C. C. A. Tenn. 1923) 290 F. 809, wherein the court said:

"The manual carrying of the suitcases for a few rods from one spot to another at Kansas City Junction is not the transportation alleged in the indictment, and for which the respondent was on trial."

The National Prohibition Act (incorporated in this title) applies to all the territory of the United States that is not otherwise excepted from its operation, and extends to all waters within its territorial limits, including a marine league from the shore. It prohibits in transit shipments of intoxicating liquors for beverage purposes touching at the ports of or moving through the United States, though same originate in and are destined to foreign countries. (1921) 32 Op. Atty. Gen. 419.

Person in legal possession of intoxicating liquor may offer a drink to his guests, and they may consume it, without violating Volstead Act (incorporated in this title) or any other statute. People v. Barbera (1926) 214 N. Y. S. 778, 127 Misc. Rep. 864.

Possession of liquor and maintenance of nuisance are continuing offenses. Marron v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 251.

Persons in charge of a vessel sailing along near the territorial waters of the United States with a cargo of whisky, and who sold a part of the same to boats from shore, are subject to arrest if they come within those waters, though inadvertently, and to prosecution as principals for aiding and abetting the illicit traffic in the United States, and it is not a defense that their sales were made in the high seas. Latham v. U. S. (C. C. A. Va. 1924) 2 F.(2d) 208.

42. Separate offenses.—Accused's possession on certain date of fruit juices is not same offense as manufacture, possession, and sale of juices a year later. Leonard v. U. S. (C. C. A. Tenn. 1927) 18 F.(2d) 208.

Possession incidental to transportation is not separate offense. Brown v. U. S. (C. C. A. Mass. 1926) 16 F.(2d) 682.

Possession and transportation of intoxicating liquors are distinct offenses, both of which the law penalizes. Earl v. U. S. (C. C. A. Wash. 1925) 4 F.(2d) 532.

"Possession" of liquor, made an offense under some circumstances by National Prohibition Act (incorporated in this title) is not the same thing as "receiving" or "concealing" it, which, when done knowing it to have been imported contrary to law was made an offense by Rev. St. § 3082 (repealed). Bookbinder v. U. S. (C. C. A. Pa. 1923) 287 F. 790, certiorari denied (1923) 43 S. Ct. 523, 262 U. S. 748, 67 L. Ed. 1213.

It has been held that manufacture of liquor necessarily connotes possession of the liquor manufactured and of the apparatus for its manufacture, and defendants convicted of illegal manufacture cannot also be convicted on separate counts of illegal possession of either the liquor or the apparatus. Tritico v. U. S. (C. C. A. Tex. 1925) 4 F.(2d) 664. But in another case it was held that manufacturing intoxicating liquor without a permit; failing to make a permanent record of such liquor; and possession of property designed to manufacture liquor intended for use in violation of this act are separate offenses. Ex parte Poole (D. C. Mont. 1921) 273 F. 623.

Evidence showing purchase of drink of liquor poured from a half-filled bottle, which remained in defendant's possession, sustained conviction under this section, for possession as well as sale, as against contention that the possession was merged in the sale. Melendez v. U. S. (C. C. A. Porto Rico, 1926) 15 F.(2d) 770. And in a prosecution for the sale of intoxicating liquor, it was immaterial whether or not accused had liquor in his possession at the time and place laid in the information; possession of intoxicating liquor and the sale thereof being separate and distinct offenses. Beyer v. U. S. (C. C. A. N. J. 1922) 282 F. 225.

43. Manufacture.—Under this section, manufacture of intoxicating liquor for beverage purposes and for non-beverage and sacramental purposes without a permit is unlawful. Weinstein v. U. S. (C. C. A. Mass. 1923) 293 F. 388.

Under this section prohibiting the manufacture of intoxicating liquor except as authorized in the act, and section 46 of this title, specifying penalties for violation, which are inapplicable to a person who manufactures "non-intoxicating cider and fruit juices exclusively for use in his home," the manufacture of cider and fruit juices containing more than one-half of one per cent. of alcohol by volume does not violate the statute where not in fact intoxicating, notwithstanding section 4 of this title, defining intoxicating liquor as any fermented liquor containing one-half of one per cent. or more of alcohol by volume, fit for use for beverage purposes. U. S. v. Hill (D. C. Md. 1924) 1 F.(2d) 954. The court said:

"The government contends, and its con-

tention is not without some force, that the words 'nonintoxicating cider,' which a person may manufacture for use in his own home, must be construed with reference to the definition of the term 'intoxicating liquor' given in the first section [section 4 of this title], to wit, that it shall not contain one-half of one per cent. or more of alcohol by volume. But it is obvious that by the concluding sentence of section 29 of the act [section 46 of this title], Congress intended that persons manufacturing nonintoxicating cider for use in their homes, and not for sale, should be in a class by themselves, at least in some particulars, otherwise the sentence has no meaning or use whatsoever. If it was intended to punish persons for manufacturing cider for use in their own homes, which contains more than one-half of one per cent. of alcohol by volume, there was no necessity for the provision, for the act without the sentence already provided such punishment. If, on the other hand, it was intended by Congress that persons who made cider containing less than one-half of one per cent. by volume should not be subject to punishment, there was no need for the provision, for the reason that the other provisions of the act did not provide punishment for such person. The only reasonable explanation for singling out home manufactures of cider and fruit juices for special mention in this section, to my mind, is that Congress did not intend to subject them to the strict provisions as to the alcoholic content of the product specified in section 1, but intended to prohibit the manufacture of cider and fruit juices for home use, which should be, in fact, intoxicating. If the section is so interpreted, then there is a reason for its insertion in the act.

"The interpretation of the law is borne out at least to some extent by the discussion in the United States Senate on September 4, 1919, reported in the Congressional Record, vol. 58, pt. 5, pp. 4847 and 4848, when the sentence above quoted, or part of it, was first inserted in the act by amendment. The opinion was then expressed on the floor of the Senate by the chairman of the committee in charge of the bill that the cider and fruit juices prohibited as to manufacture for home use were those intoxicating in fact."

Sales to druggists by wholesale dealers. See note to section 23 of this title.

44. Sale.—Sales of liquor may be consummated without payment of price in money on delivery. Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260.

One unlawfully selling intoxicating liquor is not punishable for failure to keep record of sales, such statutory requirement being applicable only to permittees. U. S. v. Katz (Pa. 1926) 46 S. Ct. 513, 271 U. S. 354, 70 L. Ed. 986, affirming (D. C. 1925) 5 F.(2d) 527.

Delivery of bonded warehouse receipts is sufficient to complete the sale of intoxicating liquor, without manual delivery of the liquor. Smuiyan v. U. S. (C. C. A. Ohio, 1923) 293 F. 283.

Selling intoxicating liquor is not, under federal law, a "crime involving moral turpitude." People v. Cook (App. Div. 1927) 221 N. Y. S. 96.

That a check given in payment for liquor proved to be worthless did not prevent the transaction from being a sale. Albert v. U. S. (C. C. A. Ohio, 1922) 281 F. 511.

Since passage of National Prohibition Act (incorporated in this title) everyone has been forbidden to sell intoxicating liquors. Rood v. U. S. (C. C. A. W. Va. 1925) 7 F.(2d) 45.

Whether property in goods is transferred depends on intention of parties, however indicated. Filiatreau v. U. S. (C. C. A. Ky. 1926) 14 F.(2d) 659.

The seller of an extract consisting of fifty per cent. alcohol, under circumstances from which he could reasonably infer that it was intended to be used as a beverage, is subject to prosecution for unlawful sale of intoxicating liquor. Massei v. U. S. (C. C. A. Va. 1924) 295 F. 683, certiorari denied (1924) 44 S. Ct. 404, 264 U. S. 592, 68 L. Ed. 865.

One who told a buyer of whisky that he knew a man from whom the buyer could obtain whisky, and who purchased the whisky from the seller with money given him by the buyer, was guilty of "selling" whisky, in violation of the National Prohibition Act (incorporated in this title) since he was acting as the seller's agent, without whose aid and assistance the seller could not have made the sales. Wigington v. U. S. (C. C. A. Va. 1924) 296 F. 125, certiorari denied (1924) 44 S. Ct. 454, 264 U. S. 596, 68 L. Ed. 867.

A "sale" is a contract for the transfer of property from one person to another for a valuable consideration, and to constitute a sale of whisky there must be the assent of two parties (quoting Words and Phrases, Sale). Scoggins v. U. S. (C. C. A. Ark. 1919) 255 F. 825.

45. Possession.—Permit authorizing manufacture and possession of wine for nonbeverage purposes, does not afford protection to one possessing such liquors with intent to use them in violation of National Prohibition Act (incorporated in this title). Dumbra v. U. S. (N. Y. 1925) 45 S. Ct. 546, 268 U. S. 435, 69 L. Ed. 1032.

Taking drink at owner's invitation does not constitute criminal "possession." Colbaugh v. U. S. (C. C. A. Okl. 1926) 15 F. (2d) 929.

Criminal possession of intoxicating liquor requires more than knowledge of possession in another, absent power of disposal, either sole or joint. Id.

This section prohibits the possession of intoxicating liquor. Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260.

Possession of beer found on brewery premises after revocation of dealcoholizing permit was unlawful, and violated this section in view of section 50 of this title, so as to authorize destruction of manufacturing equipment found on premises. U. S. v. Auto City Brewing Co. (D. C. Mich. 1925) 5 F.(2d) 362.

Under the National Prohibition Act (incorporated in this title) unless one holds a permit, it is unlawful to have intoxicating liquor in his possession on premises used partly as a saloon and partly as a dwelling, or used exclusively as a saloon. U. S. v. Maag (D. C. Pa. 1923) 287 F. 356.

It has been held that the National Prohibition Act (incorporated in this title) does not restrain possession of intoxicating liquor for one's own use or for the entertainment of his family and friends on premises used exclusively as a dwelling. U. S. v. Maag (D. C. Pa. 1923) 287 F. 356; Bryson v. State (1921) 108 S. E. 63, 27 Ga. App. 230; Abbott v. State (1924) 125 S. E. 723, 33 Ga. App. 146. And that possession of intoxicating liquor except with intent to violate law, is not unlawful. Petition of Shoemaker (D. C. Pa. 1925) 9 F.(2d) 170. And that the Eighteenth Amendment does not make the mere possession of intoxicating liquors an offense, and Congress has no power and did not attempt under this Act to make mere possession, stripped of every other fact, a crime, being an offense only when prohibited for the purpose of making effective that which the amendment prohibits. U. S. v. Illig (D. C. Pa. 1920) 288 F. 939.

That a truckman left his trucks with intoxicating liquor on defendants' premises overnight was held insufficient to show possession by defendants, in the absence of proof that truckman was defendant's agent. Huth v. U. S. (C. C. A. Ky. 1924) 295 F. 35.

A storage warehouseman, who merely leased a room in which the owner of liquor stored it, does not possess the liquor. Street v. Lincoln Safe Deposit Co. (N. Y. 1920) 41 S. Ct. 31, 254 U. S. 88, 65 L. Ed. 151, 10 A. L. R. 1548, reversing (D. C. 1920) 267 F. 706.

Possession of intoxicating liquor coming from unlawful transportation is illegal. People v. Wade (1926) 214 N. Y. S. 781, 126 Misc. Rep. 762, reversed on other grounds (1926) 217 N. Y. S. 486, 127 Misc. Rep. 593.

Knowledge by an employé of the possession of liquor by his employer, or his handling of it as an employé, does not constitute possession by him. Feinberg v. U. S. (C. C. A. Colo. 1924) 2 F.(2d) 955.

46. Transportation in general.—The transportation of liquor for beverage purposes, except by permittees, is forbidden by this act. Corneli v. Moore (D. C. Mo. 1920) 268 F. 993.

A taxi driver, who answered a call at a building formerly a saloon and was employed to take a passenger a distance of 150 miles, for which the charge for the round trip would be $120, and who left his taxi in the alley back of the saloon, and thereafter found that it had been moved, and several sacks placed therein, was chargeable with knowledge that the taxi was being used for the illegal transportation of liquor. U. S. v. One W. W. Shaw Automobile Taxi and 186 Quarts of Penwick Whisky (D. C. Ohio, 1921) 272 F. 491, affirmed Pittsburgh Taxicab Co. v. U. S. (C. C. A. 1922) 281 F. 669, 24 A. L. R. 1125.

The carriage of liquors on board a vessel entering American waters, though not intended for delivery within the United States, was held "transportation" and the bringing into ports of the United States of intoxicating liquors as part of ship's stores intended for sale to passengers for their consumption after the vessel has left the jurisdiction of the United States, though sealed while within the jurisdiction, also was held a transportation. Cunard S. S. Co. v. Mellon (D. C. N. Y. 1922) 284 F. 890, affirmed (1923) 43 S. Ct. 504, 262 U. S. 100, 67 L. Ed. 894, 27 A. L. R. 1306.

"Transportation" of intoxicating liquor, made unlawful by this act, except as authorized, does not imply a delivery to another than the person who carries the liquor. Id.

Even if the words "transport" and "transportation," as used in this act, are not given their literal meaning, but are to be construed in the light of legislative intent, the prohibition in the act of the transportation of intoxicating liquors, except as permitted therein, prohibits the transportation in a port of the United States from one foreign vessel to another of intoxicating liquors brought in from a foreign country and consigned to another country. Anchor Line (Henderson Bros.) v. Aldridge (C. C. A. N. Y. 1921) 280 F. 870. And see Grogan v. Hiram Walker & Sons (Mich. 1922) 42 S. Ct. 423, 259 U. S. 80, 66 L. Ed. 836, 22 A. L. R. 1116, reversing Hiram Walker & Sons v. Lawson (D. C. 1921) 275 F. 373.

47. Removal of liquor from warehouse.—The prohibition in this section against transporting intoxicating liquor, except as authorized by the act, does not prohibit transportation of liquor from a storage warehouse, where it was stored by the owner, to his residence, for the private use of himself and his family and guests,

which is a use permitted by the act, especially since it has not been construed by the Internal Revenue Bureau to prohibit the transportation of liquor from one residence to another. Street v. Lincoln Safe Deposit Co. (N. Y. 1920) 41 S. Ct. 31, 254 U. S. 88, 65 L. Ed. 151, 10 A. L. R. 1548, reversing (D. C. 1920) 267 F. 706.

A storage warehouseman, who merely leased a room in which the owner of liquor stored it, does not "deliver" it to the owner, by permitting the owner to remove it from the warehouse. Id.

But intoxicating liquor cannot be transported from a bonded warehouse to the owner's residence, notwithstanding sections 39 and 50 of this title, and the proviso of this section permitting the purchase and sale of warehouse receipts for liquors in bonded warehouses, as a bonded warehouse cannot be regarded as a mere convenience contributory to the dwelling. Construing this act as prohibiting the transporting of intoxicating liquor intended for beverage purposes from a bonded warehouse to the owner's residence though the liquor was manufactured and lawfully acquired before the enactment of this act, does not take from property its essential attributes, in violation of the Fifth Amendment. Corneli v. Moore (Mo. 1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332, affirming (D. C. 1920) 267 F. 456.

In view of the distinction made between liquor in bond and liquor out of bond held for private purposes, as manifested by the provision of this section that nothing in the section shall prohibit the sale of warehouse receipts covering spirits in bonded warehouses, no liquors can be withdrawn for beverage purposes from a bonded warehouse, though an owner can remove his own liquor from a private warehouse for such purposes. Lacks v. Mitchell (D. C. Cal. 1921) 278 F. 393.

The provision in this section that the act shall be construed liberally to prevent the use of liquor for beverage purposes, will not be construed to permit the removal of whisky stored in warehouses for beverage purposes, unless such construction is too clear for reasonable dispute. Corneli v. Moore (D. C. Mo. 1920) 267 F. 456, affirmed (1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332.

Since the transportation of intoxicating liquor within and the exportation thereof from the United States for beverage purposes is prohibited by the Eighteenth Amendment, after the effective date of this act, it is unlawful to withdraw such liquor from bond for export or for any purpose that requires transportation when the liquor is intended for beverage purposes. (1920) 32 Op. Atty. Gen. 92.

48. Importation and exportation.—Importing liquor is unlawful in view of this section. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, affirmed (1927) 47 S. Ct. 531, 71 L. Ed. ——. But "it is apparent from the provisions of this act that intoxicating liquor may be imported for nonbeverage purposes. It is likewise manifest that the provisions of this act shall not in any way interfere with the operation of existing law, except where it is inconsistent. The Goodhope (D. C. Wash. 1920) 268 F. 694.

National Prohibition Act (incorporated in this title) forbids exportation of beverage liquor. Blair v. Stewart Distilling Co. (App. D. C. 1926) 12 F.(2d) 838.

49. Concealment of liquor.—Intoxicating liquor was held "merchandise," within section 497 of Title 19, Customs Duties, prohibiting the concealing of "merchandise," knowing it to have been smuggled, though its importation had been prohibited by the National Prohibition Law (incorporated in this title) prior to enactment of such section. Powers v. U. S. (C. C. A. Tex. 1923) 294 F. 512; Bookbinder v. U. S. (C. C. A. Pa. 1923) 287 F. 790, certiorari denied (1923) 43 S. Ct. 523, 262 U. S. 748, 67 L. Ed. 1213.

50. Nuisances.—See, also, notes to sections 33 and 34 of this title.

Roadhouse, where intoxicating liquor was consumed, was held "nuisance," in view of this section notwithstanding owners did not own, sell, or barter liquor. U. S. v. Budar (C. C. A. Wis. 1925) 9 F.(2d) 126.

Under this section, maintaining for profit place where intoxicating liquor is habitually brought by others to be there possessed and consumed was held to constitute "keeping of liquor for commercial purposes," and "nuisance," within section 33 of this title, though proprietor does not own or sell liquor. Notary v. U. S. (C. C. A. Colo. 1926) 16 F.(2d) 434.

51. Conspiracies.—Under Rev. St. § 2766 (superseded) intoxicating liquor is still merchandise, and can only be imported under provisions for permits under this section and Regulations of Treasury Department, Prohibition Unit, §§ 1630, 1631, 1637 et passim; and conspiracy to avoid any of these provisions by smuggling liquor into United States would be conspiracy to defraud United States. Horwitz v. U. S. (C. C. A. Mass. 1925) 5 F.(2d) 129.

Conspiracy to transport liquor in violation of section 88 of Title 18, Criminal Code and Criminal Procedure, is not merged in offense of transporting liquor. Goukler v. U. S. (C. C. A. N. J. 1923) 294 F. 274.

Conspiracy to commit crime being an offense different from that crime which is the object of the conspiracy, possession of

intoxicating liquors in violation of National Prohibition Act (incorporated in this section) is not of common origin with conspiracy to commit such offenses, under section 88 of Title 18, Criminal Code and Criminal Procedure. Linden v. U. S. (C. C. A. N. J. 1924) 2 F.(2d) 817.

An indictment lies, under section 88 of Title 18, Criminal Code and Criminal Procedure for conspiracy to violate National Prohibition Act (incorporated in this title) by the unlawful transportation of intoxicating liquors. Welter v. U. S. (C. C. A. Neb. 1925) 4 F.(2d) 342.

Wholesale druggists, selling intoxicating liquor for nonbeverage purposes, in purported pursuance of the National Prohibition Act (incorporated in this title) without corrupt intent to violate the regulations of the Treasury Department limiting sales, are not guilty of conspiracy under section 88 of Title 18, Criminal Code and Criminal Procedure. Landen v. U. S. (C. C. A. Ohio, 1924) 299 F. 75. The court said: "It is settled that with regard to criminal prosecutions for those acts which are not mala in se, but which through legislative exercise of the police power have become mala prohibita, no conscious intent to break any law is essential. The respondent need not even know that the law exists. Shevlin v. Minnesota (Minn. 1910) 218 U. S. 57, 63, 30 S. Ct. 663, 54 L. Ed. 930; U. S. v. Balint (N. Y. 1922) 258 U. S. 250, 252, 42 S. Ct. 301, 66 L. Ed. 604; Armour v. U. S. (Mo. 1908) 209 U. S. 56, 85, 86, 28 S. Ct. 428, 52 L. Ed. 681. When, however, the prosecution is for conspiracy, the text-books and elementary discussions seem to agree that there must be a 'corrupt intent,' which is interpreted to be the mens rea, the conscious and intentional purpose to break the law. Bishop's Criminal Law (8th Ed.) §§ 297, 300; 12 C. J., p. 552, § 16; 5 R. C. L. p. 1066, § 6."

52. Persons liable.—One cannot escape criminal responsibility by contract to obey orders of a wrongdoer. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —.

One charged with unlawful possession of liquor is not entitled to acquittal on the ground that his possession was as agent of another. Timell v. U. S. (C. C. A. Idaho, 1925) 5 F.(2d) 901.

Officers of vessel carrying liquor, hovering off U. S. coast, were held chargeable with knowledge of U. S. laws. Ford v. U. S. (C. C. A. Cal. 1925) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —.

Defendant, who, with money furnished by the buyer, bought whiskey from a third party, which he delivered to buyer, held guilty of selling whiskey in violation of National Prohibition Act (incorporated in this title). Allen v. U. S. (C. C. A. Or. 1925) 6 F.(2d) 199.

The fact that a defendant was not present on a boat in which liquor was transported does not absolve him from a charge of illegal transportation, where evidence shows that he was a party to the transaction. Brown v. U. S. (C. C. A. Mass. 1926) 16 F.(2d) 682.

The officers and crew of a foreign vessel engaged in transferring liquors at sea to other vessels to be transported in United States waters in violation of law are aiders and abettors in the offense, and as such liable as principals. U. S. v. Ford (D. C. Cal. 1925) 3 F.(2d) 643, affirmed (C. C. A. 1926) 10 F.(2d) 339.

Where two persons were associated as owner and manager of a place where liquor was illegally sold and served by waiters, each is chargeable with the offense as principal. Heitler v. U. S. (C. C. A. Ill. 1922) 280 F. 703.

As it is no crime to purchase whisky, the purchaser is not a participant in the seller's offense, and is not an accomplice, where the seller is charged only with illegal selling and transportation, and not with conspiracy to violate this act. Singer v. U. S. (C. C. A. N. J. 1922) 278 F. 415, certiorari denied (1922) 42 S. Ct. 272, 258 U. S. 620, 66 L. Ed. 795.

Failure of sheriff to enforce state law does not make him party to conspiracy to violate this law, unless inaction is with view of aiding conspiracy. Burkhardt v. U. S. (C. C. A. Ohio, 1926) 13 F.(2d) 841.

Defendant, with knowledge that others were conspiring to violate National Prohibition Act (incorporated in this title), and were purchasing material pursuant to such conspiracy, and with such knowledge assisting and aiding by selling and delivering materials, making it possible to carry out unlawful object of conspiracy, is a co-conspirator, under section 88 of Title 18, Criminal Code and Criminal Procedure, and punishable as such. Pattis v. U. S. (C. C. A. Idaho, 1927) 17 F.(2d) 562.

Landlord, knowing of the manufacture of liquor on premises, and failing to stop it, is not necessarily guilty of conspiracy to violate National Prohibition Act (incorporated in this title). Di Bonaventura v. U. S. (C. C. A. W. Va. 1926) 15 F.(2d) 494.

Landlord's failure to stop unlawful manufacture of liquor after knowledge that premises are used therefor under some circumstances may justify his conviction of manufacturing. Id.

Where there was evidence showing that defendant sold whisky at a buffet on a number of days to a certain person, he was properly prosecuted and convicted as a principal under an information charging him with the unlawful maintenance of a place for the sale of intoxicating liquors,

though he was not shown to be the "proprietor" of the place where he sold the liquor. Vesely v. U. S. (C. C. A. Cal. 1921) 276 F. 693, certiorari denied (1922) 42 S. Ct. 590, 259 U. S. 588, 66 L. Ed. 1077.

53. Defenses—In general.—The fact that a witness who purchased intoxicating liquor was a decoy, acting on behalf of a government officer, is no defense to a prosecution for the illegal sale. Ramsey v. U. S. (C. C. A. Tenn. 1920) 268 F. 825; Saucedo v. U. S. (C. C. A. Tex. 1920) 268 F. 830.

54. Immunity.—One who answered questions of government agent investigating violations of National Prohibition Act (incorporated in this title), and thereafter testified in liquor prosecution of other person, without objection, was not immune from prosecution for conspiracy to violate such Act, under Fifth Amendment, where neither such statements nor testimony had slightest tendency to incriminate him, and were not introduced against him in such subsequent prosecution. Johnson v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 471, certiorari denied Eick v. U. S. (1925) 46 S. Ct. 101, 269 U. S. 574, 70 L. Ed. 419.

55. Former jeopardy and res judicata.—Judgment in contempt proceeding for violating liquor injunction held not bar to prosecution for selling liquor. Orban v. U. S. (C. C. A. Mich. 1927) 18 F.(2d) 374.

Conviction for possession is not bar to prosecution for conspiracy to possess, nor for unlawful transportation. Hilt v. U. S. (C. C. A. Fla. 1926) 12 F.(2d) 504.

Acquittal of offense under National Prohibition Act (incorporated in this title) did not bar prosecution for other offenses of same nature occurring within three years before filing of information in first prosecution, where government in first case neither proved nor attempted to prove commission of offenses for which conviction was subsequently had. Bosio v. U. S. (C. C. A. Wash. 1926) 16 F.(2d) 57, certiorari denied (1927) 47 S. Ct. 586, 71 L. Ed. —.

Where indictment charged conspiracy, under section 88 of Title 18, Criminal Code and Criminal Procedure, to violate National Prohibition Act (incorporated in this title), and in another count charged unlawful possession, conviction on later count was valid, notwithstanding disagreement as to conspiracy count, and conviction in later trial on conspiracy count was valid, there being no jeopardy by reason of disagreement. Linden v. U. S. (C. C. A. N. J. 1924) 2 F.(2d) 817.

An information charging defendant with violation of the National Prohibition Act (incorporated in this title) to which he did not plead and on which he was not tried, has been held not to be a bar to a subsequent indictment for conspiracy to commit such offenses, though the overt acts alleged are the same acts charged in the information. U. S. v. Parrillo (C. C. A. N. J. 1924) 299 F. 714.

"Failure to pay the tax on the liquor before removing it from the bonded warehouse, or to remove it during the absence of the storekeeper or without his knowledge, which are denounced by the earlier act, are a different class of offenses from those of transporting liquor without a permit, or without complying with the other requirements of the Enforcement Act [incorporated in this chapter] relative to transportation. And a conviction or acquittal of any or all of one class would not exempt the defendant from prosecution or conviction of any or all of the other class." U. S. v. Freidericks (D. C. N. J. 1921) 273 F. 188.

56. —— Prosecutions in different jurisdictions.—In the absence of special provision by Congress to the contrary, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors, is not a bar to a prosecution in a court of the United States under the National Prohibition Law (incorporated in this title), for the same acts. U. S. v. Lanza (1922) 260 U. S. 377, 43 S. Ct. 141, 67 L. Ed. 314, reversing (D. C. Wash. 1920) 268 F. 864. To the same effect, see U. S. v. Bostow (D. C. Ala. 1921) 273 F. 535. In U. S. v. Ratagczak (D. C. Ohio, 1921) 275 F. 558; U. S. v. McCann (D. C. Conn. 1922) 281 F. 880; Singleton v. U. S. (C. C. A. S. C. 1923) 287 F. 353; Hall v. Com. (1923) 197 Ky. 179, 246 S. W. 441; Little v. Com. (1923) 197 Ky. 320, 247 S. W. 2.

And a prosecution, even though followed by an acquittal, of an offense against the state law, is not a bar to a prosecution for an offense against the federal law, consisting of the same acts charged as an offense against the state law. U. S. v. McCain (D. C. Pa. 1924) 1 F.(2d) 985.

The fact that the defendant indicted for violating the National Prohibition Act (incorporated in this title) has been indicted in a state court under a state statute for the same transaction does not prevent the federal court from proceeding to try the defendant for the violation of the federal act, the offenses not being the same. U. S. v. Bostow (D. C. Ala. 1921) 273 F. 535.

So it has been held that the previous conviction of a defendant in the state court for importing, transporting, and having intoxicating liquor in his possession in violation of the state law cannot be availed of to prevent his prosecution in a federal court for violating the Volstead Act (incorporated in this title) by importing, transporting, and having

intoxicating liquor in his possession. U. S. v. Holt (D. C. N. D. 1921) 270 F. 639.

In several states, it has been held that the fact that a person has been acquitted or convicted in a prosecution in a federal court for a violation of this act, does not constitute a bar to a subsequent prosecution for the same offense in a state court. Gilbert v. State (1923) 95 So. 502, 19 Ala. App. 104; Gamlin v. State (1923) 95 So. 505, 19 Ala. App. 119; Smith v. State (1923) 96 So. 375, 19 Ala. App. 221; State v. Harrison (1922) 184 N. C. 762, 114 S. C. 830; Mason v. State (1923) 19 Ala. App. 473, 98 So. 137; State v. Rhodes (1922) 242 S. W. 642, 146 Tenn. 398, 22 A. L. R. 1544.

But in Oregon it has been held, that a conviction under the Volstead Act (incorporated in this title) bars a subsequent prosecution under a state prohibition law based on the same facts. State v. Smith (1921) 101 Or. 127, 199 P. 194, 16 A. L. R. 1220.

57. Entrapment.—"Entrapment" is the seduction or improper inducement to commit a crime, and not the testing by trap, trickiness, or deceit of one suspected. U. S. v. Wray (D. C. Ga. 1925) 8 F.(2d) 429. Government officers cannot induce otherwise innocent persons to commit crime, with a view to having them prosecuted. Weiderman v. U. S. (C. C. A. Okl. 1926) 10 F.(2d) 745. Thus one who had had no intention of committing a crime but was lured into crime by officers of the law cannot be convicted, but, if the intent and purpose to violate the law were present, the mere fact that public officers furnished the opportunity is no defense. Ritter v. U. S. (C. C. A. Nev. 1923) 293 F. 187.

Offer to purchase intoxicating liquor, whereby defendant is given opportunity to violate law by making sale, does not constitute entrapment. Jordan v. U. S. (C. C. A. Ga. 1924) 2 F.(2d) 598.

Fact that enforcement officers offer to buy liquor, either in person or through agent, does not constitute entrapment. Kendjerski v. U. S. (C. C. A. Ohio, 1926) 9 F.(2d) 909.

Defendant was not entrapped if, in due course of business of selling intoxicating liquor, he made sales to government officers. Weiderman v. U. S. (C. C. A. Okl. 1926) 10 F.(2d) 745.

That prohibition agent, by pretending to be dealer in illicit whisky, induced sales to him, was held not to give rise to defense of entrapment. U. S. v. Wray (D. C. Ga. 1925) 8 F.(2d) 429.

That prohibition agents went to defendant's premises for the purpose of inducing him to sell them liquor, which he did, in order to verify their suspicion that he was unlawfully engaged in such sales, is not such entrapment as will prevent his conviction. De Long v. U. S. (C. C. A. Neb. 1925) 4 F.(2d) 244.

One of a number of defendants charged with conspiracy to violate the National Prohibition Act (incorporated in this title) was held not entitled to acquittal on the ground of entrapment because, when approached by government agents for purchase of liquor, he told them he did not handle it, where he willingly put them in communication with others who did, and with whom the purchase was negotiated. Zucker v. U. S. (C. C. A. N. J. 1923) 288 F. 12, certiorari denied (1923) 43 S. Ct. 703, 262 U. S. 756, 67 L. Ed. 1218.

Officers may lawfully entrap defendant by pretended purchases, where they have reasonable cause to believe he is violating the law. St. Clair v. U. S. (C. C. A. Neb. 1927) 17 F.(2d) 886.

In Farley v. U. S. (C. C. A. Wash. 1921) 269 Fed. 721, where all that the officers did was to go to the tavern, and while at their meals order the waiter to serve them with some cough syrup, which was understood to be whisky, and they were served accordingly with drinks in small glasses and the officers had nothing to do with furnishing the whisky; their only purpose being to ascertain whether or not the defendant was dealing in or dispensing drinks of the kind to his customers, it was held that such deportment on the part of the officers does not constitute an entrapment that relieves the defendant from guilt.

III. PROSECUTION AND PUNISHMENT

JURISDICTION AND PRELIMINARY MATTERS

71. Nature and form of remedy.—Where a misdemeanor under the National Prohibition Act (incorporated in this title) has been consummated, inasmuch as a conspiracy to commit a misdemeanor is an offense under section 88 of Title 18, Criminal Code and Criminal Procedure, the courts are not concerned with the justice or propriety of prosecuting for the felony. Lewis v. U. S. (C. C. A. Wash. 1925) 6 F.(2d) 222.

Prosecution for importing liquors held properly brought under Tariff Act (chapter 3 of Title 19, Customs Duties). U. S. v. Cardwell (D. C. Mich. 1925) 9 F.(2d) 146.

72. Jurisdiction.—It has been held that federal courts have exclusive jurisdiction of offenses committed under the National Prohibition Act (incorporated in this title). Traffic Truck Sales Co. of California v. Justice's Court of Red Bluff Tp. Tehama County (1923) 220 P. 306, 192 Cal. 377. And in New York, it has been held that a magistrate's court has no jurisdiction of offense of selling intoxicating liquor in violation of Volstead Act, Title II (incorporated in this title). People v. Wade (1926) 217 N. Y. S. 486, 127 Misc.

Rep. 593, reversing (1926) 214 N. Y. S. 187, 126 Misc. Rep. 574, and (1926) 214 N. Y. S. 781, 126 Misc. Rep. 762. And the fact that the houseboat owned by defendant, charged with possession of liquor found thereon, was moored on a navigable stream within the borders of the commonwealth does not divest the jurisdiction of the state courts, or bring the case within the exclusive jurisdiction of the federal authorities. Commonwealth v. Abel (1925) 84 Pa. Super. Ct. 102.

Under section 863 of Title 48, Territories and Insular Possessions, and in view of section 862 of the same title, federal District Court of Porto Rico has jurisdiction of offenses arising out of violation of National Prohibition Act (incorporated in this title). Ramos v. U. S. (C. C. A. P. R. 1926) 12 F.(2d) 761.

73. Preliminary hearing.—Defendant, charged with violation of National Prohibition Act (incorporated in this title) held under section 595 of Title 18, Criminal Code and Criminal Procedure, entitled to hearing before commissioner with right to examine person on whose affidavit search warrant was issued. U. S. v. Wuerstle (D. C. N. Y. 1926) 13 F.(2d) 952.

74. Removal to another district.—Evidence at preliminary hearing held insufficient to hold accused to answer in other district for conspiracy to violate Prohibition Act (incorporated in this title). Bartletta v. Mulheron (D. C. N. J. 1925) 9 F.(2d) 963.

Petition for removal in criminal prosecution for conspiracy to violate these sections, granted. U. S. v. Krevitt (D. C. N. J. 1925) 9 F.(2d) 964.

As to removal, lawful sale of whisky at price greater than its real value will not support inference that sellers were guilty of violation of section 88 of Title 18, Criminal Code and Criminal Procedure, because of conspiracy to violate National Prohibition Act (incorporated in this title). U. S. v. Motlow (D. C. Tenn. 1926) 13 F.(2d) 645.

Evidence held insufficient to justify belief of probable cause and guilt of conspiracy to violate National Prohibition Act (incorporated in this title), in violation of section 88 of Title 18, Criminal Code and Criminal Procedure, so as to warrant removal of defendants. Id.

75. Proceedings to disqualify judge.—In prosecution of sheriff for conspiracy to violate National Prohibition Act (incorporated in this title), affidavits imputing to presiding judge indecorous remarks indicative of a purpose to convict defendant of illicit traffic in intoxicating liquors and condemning defendant as sheriff for failure to enforce prohibition laws, held sufficient under section 25 of Title 28, Judicial Code and Judiciary requiring affidavits of bias and prejudice to state the facts and the reasons for the belief that such bias or prejudice exists. Chafin v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 592, certiorari denied (1925) 46 S. Ct. 18, 269 U. S. 552, 70 L. Ed. 407.

76. Continuance.—Denial of continuance to procure witness held not error. Horowitz v. U. S. (C. C. A. R. I. 1926) 10 F.(2d) 286.

In prosecution for conspiracy, under section 88 of Title 18, Criminal Code and Criminal Procedure, to transport whisky in violation of the National Prohibition Act (incorporated in this title) where accused was represented by two attorneys, and ten days after commencing taking of testimony his chief counsel announced that he was ill, refusal of adjournment and direction to other counsel to proceed with case was held not abuse of discretion. Means v. U. S. (C. C. A. N. Y. 1925) 6 F.(2d) 975.

INDICTMENT AND INFORMATION

81. Prosecution by information in general.—Information charging in three counts unlawful possession and sale of intoxicating liquor and maintenance of common nuisance is not insufficient because unverified. Merrill v. U. S. (C. C. A. Or. 1925) 6 F.(2d) 120.

The charge of selling liquor under the Volstead Act (incorporated in this title) is not an infamous crime and may be prosecuted by information. Ex parte Brede (D. C. N. Y. 1922) 279 F. 147, affirmed Brede v. Powers (1923) 44 S. Ct. 8, 263 U. S. 4, 68 L. Ed. 132.

The offenses of unlawful sale and possession of liquor, in violation of the National Prohibition Act (incorporated in this title) not being punishable by imprisonment for a term exceeding one year, are not felonies or infamous crimes, but misdemeanors, which may be prosecuted on information, instead of on indictment, in view of section 541 of Title 18, Criminal Code and Criminal Procedure. Christian v. U. S. (C. C. A. Ala. 1925) 8 F.(2d) 732.

Where plaintiff in error and B were jointly charged in an information on which a warrant was issued with violating this section and section 33 of this title, while in the supporting affidavit the information was referred to as "the foregoing information charging B with violation of section 3 [this section]" it was held that the omission of the name of plaintiff in error in the affidavit did not leave the information as to him unsupported by an affidavit, as required by Const. Amend. 4, Farinelli v. U. S. (C. C. A. Cal. 1924) 297 F. 198, holding further that the absence of an affidavit to an information on which a warrant of arrest has been issued is not a ground for setting aside a conviction subsequently had of the offense charged in the indictment.

Violations of this act may be prosecuted

by information, but an application by the government for leave to file an information against a defendant for such a violation will be denied where it appears that the government has failed to show probable cause of his guilt and that the only evidence which it can offer has been obtained as a result of an unlawful search in violation of the defendant's rights under the Fourth Amendment to the Constitution. U. S. v. Quaritius (D. C. N. Y. 1920) 267 F. 227.

82. Filing of information.—A defendant may be tried for violations of the National Prohibition Act (incorporated in this title) on an information filed by district attorney without leave of court and without proof of probable cause. Miller v. U. S. (C. C. A. N. J. 1923) 6 F.(2d) 463.

The district court has power to permit an information to be filed although the proceeding was instituted by a commissioner. U. S. v. Metzger (D. C. N. Y. 1920) 270 F. 291.

83. Signature to indictment.—An objection that an indictment for violating this Act was signed by the assistant district attorney in his own name only has been held to be without merit. Miller v. U. S. (C. C. A. Ohio, 1924) 300 F. 529, certiorari denied (1924) 45 S. Ct. 123, 266 U. S. 624, 69 L. Ed. 474.

84. Requisites and sufficiency of allegations—In general.—See, also, notes to section 49 of this title.

An information charging unlawful manufacture, possession, and sale of liquor, and maintenance of nuisance, need not identify statute violated. Leonard v. U. S. (C. C. A. Tenn. 1927) 18 F.(2d) 208.

Under sections 16 and 49 of this title, information charging unlawful manufacture, possession, and sale of intoxicating liquor, and maintenance of liquor nuisance, in language of this section is sufficient on special demurrer, without stating kind of liquor, or charging offense in language of definition given in section 4 of this title. Id.

Indictment for violation of National Prohibition Act (incorporated in this title) in connection with withdrawal of whisky from bonded warehouse by forged permits need not set out forged permits. Becher v. U. S. (C. C. A. N. Y. 1924) 5 F. (2d) 45, certiorari denied (1925) 45 S. Ct. 462, 267 U. S. 602, 69 L. Ed. 808.

Charge of possession of intoxicating liquor is not included within charge of "transportation." Earl v. U. S. (C. C. A. Wash. 1925) 4 F.(2d) 532.

An indictment charging violation of the National Prohibition Act (incorporated in this title) is not defective, because failing to charge defendant's intent to violate the act. Huth v. U. S. (C. C. A. Ky. 1924) 295 F. 35.

The word "whisky," used in an indictment or information for violation of the National Prohibition Act (incorporated in this title) connotes intoxicating liquor. Hensberg v. U. S. (C. C. A. Mo. 1923) 288 F. 370.

Where an information charges a sale of "whisky," its fitness for beverage purposes, in a legal sense, need not be averred or proved. Id.

Where offenses are charged substantially in language of penal provisions of Volstead Act (incorporated in this title), allegations as to alcoholic content of liquor and its fitness as beverage are unnecessary, in view of this section. People v. Norcross (1925) 234 P. 438.

Counts of indictment for conspiracy to violate National Prohibition Act (incorporated in this title) must be viewed not as framed under that act but under the conspiracy section. Rulovitch v. U. S. (C. C. A. N. J. 1923) 286 F. 315. Certiorari denied (1923) 43 S. Ct. 434, 261 U. S. 622, 67 L. Ed. 831 (section 88 of Title 18, Criminal Code and Criminal Procedure).

Information charging unlawful manufacture, possession, and sale of "intoxicating liquor" in language of statute held sufficient. Leonard v. U. S. (C. C. A. Tenn. 1927) 18 F.(2d) 208.

Indictment held sufficient, see Burns v. U. S. (C. C. A. Fla. 1924) 296 F. 468.

Where the bill of particulars in a prosecution for violating the National Prohibition Act (incorporated in this title) and the proof showed that the offenses charged arose in connection with the operation of a distillery, and that the government was unable to specify times and places with greater particularity because the details of the transactions were concealed by defendants, held that failure to make charges more specific was justified. Huth v. U. S. (C. C. A. Ky. 1924) 295 F. 35.

An information charging transportation of liquor and having possession of liquor, in violation of National Prohibition Act (incorporated in this title) held sufficient, where it alleged that it was not for any one of the several purposes for which transportation or possession is authorized by the act. Bell v. U. S. (C. C. A. Tex. 1922) 285 F. 145, certiorari denied (1923) 43 S. Ct. 521, 262 U. S. 744, 67 L. Ed. 1211.

An indictment for importing or possessing certain described liquors, but which did not allege that they were intoxicating or imported for beverage purposes held not to state an offense. U. S. v. Boasberg (D. C. La. 1922) 283 F. 305, writ of error dismissed (1923) 43 S. Ct. 246, 260 U. S. 756, 67 L. Ed. 498.

An indictment charging in one count that defendants conspired to violate title 2 of the National Prohibition Act (incorporated in this title) in that they "would then and there possess certain intoxicating liquors describing them, contrary

to the provisions of said act," and in the second count that the same persons, at the same time and place, "unlawfully and knowingly did possess certain intoxicating liquors" described, held insufficient to charge an offense in either count. Hilt v. U. S. (C. C. A. Fla. 1922) 279 F. 421.

See Vesely v. U. S. (C. C. A. Cal. 1921) 276 F. 603, certiorari denied (1922) 42 S. Ct. 590, 259 U. S. 588, 66 L. Ed. 1077.

85. —— Negativing defenses.—See, also, notes to section 49 of this title.

An indictment for unlawful possession of intoxicating liquor, in violation of this section and section 46 of this title, need not negative exceptions which might have made possession lawful. Schooley v. U. S. (C. C. A. Ark. 1925) 4 F.(2d) 767; Massey v. U. S. (C. C. A. Ark. 1922) 281 F. 293.

So an information charging "unlawful" possession of liquors in violation of this section, need not negative the exceptions stated in the second paragraph of the section, by alleging that the liquor was possessed for beverage purposes. Feinberg v. U. S. (C. C. A. Colo. 1924) 2 F.(2d) 955.

An information charging the unlawful manufacture of intoxicating liquor is not defective because the method of manufacture is not alleged, or the particular statute violated is not pointed out; but it is for defendant to show that his manufacture is lawful. Adamson v. U. S. (C. C. A. Ga. 1924) 296 F. 110.

An indictment charging defendants with conspiracy to unlawfully transport, sell, etc., whisky in violation of this section, held not required to aver that the whisky was not to be used for nonbeverage purposes, especially in view of the express provision of section 49 of this title, that "it shall not be necessary in any * * * indictment to include any defensive negative averments." Davis v. U. S. (C. C. A. Cal. 1921) 274 F. 928.

In view of declaration of this section, that "no person shall * * * manufacture," etc., "any intoxicating liquor except as authorized in this act," it is not necessary in charging offense under act to negative any of exceptions, since language defining offenses is separable from exceptions. People v. Norcross (1925) 234 P. 438, 71 Cal. App. 2.

In an indictment charging in separate counts conspiracy to "unlawfully possess," to "unlawfully transport," and to "unlawfully sell" intoxicating liquor prohibited by law, the words "unlawfully" sufficiently exclude the exceptional cases in which liquor may be lawfully possessed, transported, or sold, under this section. Rulovitch v. U. S. (C. C. A. N. J. 1923) 286 F. 315, certiorari denied (1923) 43 S. Ct. 434, 261 U. S. 622, 67 L. Ed. 831.

Indictment for conspiracy to violate Prohibition Act (incorporated in this title) was held not demurrable for failure to negative possibility that objects of conspiracy were lawful, where indictment alleged that acts were in violation of this section. U. S. v. Dwyer (D. C. N. Y. 1926) 13 F.(2d) 427.

Indictment charging conspiracy to violate this section, through unlawful agreements to possess, sell, transport, store, and deal in intoxicating liquor, and specifying certain overt acts, was held sufficient, without charging transportation to be without permit, in view of section 49 of this title. Williams v. U. S. (C. C. A. Tenn. 1925) 3 F.(2d) 933.

86. —— Manufacture.—Count of information charging manufacture of liquor in violation of National Prohibition Act (incorporated in this title) was held not objectionable, as not stating place maintained by accused for the purpose of manufacturing intoxicating liquor. Walker v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 309.

In a liquor prosecution, based on two counts of information, one charging possession of property designed for manufacture of liquor, and the other the manufacture thereof in Vallejo, Cal., in violation of National Prohibition Act (incorporated in this title), a discrepancy in description of county in which Vallejo is situated, arising from fact that in the first count Vallejo was described as being in Sonoma county, and in the other as being in Solano county, was held not prejudicial, in view of evidence showing that the premises described were in Vallejo, and that Vallejo is in Solano county. Id.

87. —— Sale.—Information for sale of intoxicating liquor under National Prohibition Act (incorporated in this title) need not allege liquor was fit for beverage purposes, or that it was sold for such purposes. Myers v. U. S. (C. C. A. Neb. 1926) 15 F.(2d) 977.

And where indictment charged defendant with unlawfully selling intoxicating liquor which was fit for use for beverage purposes, and which possession was prohibited and unlawful and contrary to statute, it was unnecessary to further allege that liquor was sold for beverage purposes. McCarren v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 113.

An information charging that the defendants unlawfully, willfully, and knowingly did "sell certain intoxicating liquor, to wit, claret wine, containing one-half of 1 per cent. or more of alcohol by volume, and then and there fit for use for beverage purposes," and that said sale was in violation of this section, held not subject to objection that it was not alleged that the wine was sold for beverage purposes. A count that the sale was "then and there prohibited and unlawful, and in violation of this section, necessarily excludes the idea that the wine was sold for

legitimate and not for unlawful beverage purposes. Cabiale v. U. S. (C. C. A. Cal. 1921) 276 F. 769.

An indictment charging the sale for beverage purposes of intoxicating liquor, further defined as distilled spirits containing more than one-half of 1 per cent. of alcoholic content, held sufficient. Heitler v. U. S. (C. C. A. Ill. 1922) 280 F. 703.

Counts in an indictment charging merely that defendants carried on the business of wholesale liquor dealer, retail liquor dealer, or rectifier without having paid the special tax, were not sufficient to charge the offense of illegal sale. U. S. v. Remus (D. C. Ohio, 1922) 283 F. 685, modified (1923) 43 S. Ct. 197, 260 U. S. 477, 67 L. Ed. 358.

A count which charged that the defendants did unlawfully, willfully, and knowingly sell intoxicating liquor containing one-half of one per cent. or more, of alcohol by volume, fit for beverage purposes, was held clearly sufficient. Ritter v. U. S. (C. C. A. Nev. 1923) 293 F. 187.

Indictment for unlawful sales of liquor held sufficient. Furlong v. U. S. (C. C. A. Neb. 1926) 10 F.(2d) 492.

Where an indictment for unlawfully carrying on the business of a retail liquor dealer without paying the special tax in violation of section 193 of Title 26, Internal Revenue, was sufficient to charge a sale of intoxicating liquor in violation of this section and section 46 of this title, it was sustained as an indictment under the National Prohibition Act (incorporated in this title); the omission to pay the special tax being treated as surplusage. Farley v. U. S. (C. C. A. Wash. 1921) 269 F. 721.

Information charging that defendants "did unlawfully, willfully, and knowingly sell intoxicating liquor containing one-half of 1 per cent. or more of alcohol by volume fit for beverage purposes," held sufficient to charge the unlawful sale of intoxicating liquor. Ritter v. U. S. (C. C. A. Nev. 1923) 293 F. 187.

88. —— Possession.—It is not sufficient in an indictment for unlawful possession of intoxicating liquor to allege merely possession of liquor by defendant and his intended use thereof as a beverage. U. S. v. Cleveland (D. C. Ala. 1922) 281 F. 249.

An information for possession which sufficiently informs accused of offense charged is sufficient. Gray v. U. S. (C. C. A. Cal. 1926) 9 F.(2d) 237.

Charge of possessing liquor should aver facts showing illegal possession, and pleader's conclusion alone is insufficient. U. S. v. Berger (D. C. Pa. 1925) 9 F.(2d) 167.

Information charging possession held not insufficient for want of averment that possession was with intent to use unlawfully. Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260.

Information charging possession of liquor in violation of National Prohibition Act (incorporated in this title) held not to charge public offense. U. S. v. Berger (D. C. Pa. 1925) 9 F.(2d) 167.

Notwithstanding that indictment for violation of this section and section 46 of this title, was insufficient to charge previous convictions, warranting conviction of felony, punishable under section 541 of Title 18, Criminal Code and Criminal Procedure, such indictment held sufficient to charge unlawful possession of intoxicating liquor, in violation of section 46 of this title. Schooley v. U. S. (C. C. A. Ark. 1925) 4 F.(2d) 767.

An information charging that defendant unlawfully had a stated quantity of whisky in his possession held sufficient, under this section and sections 49 and 50 of this title; the burden of proving that his possession was lawful resting on defendant. Nunn v. U. S. (C. C. A. Ariz. 1925) 4 F.(2d) 380.

Counts in an indictment for having unlawful possession of intoxicating liquor, held not subject to demurrer. Millich v. U. S. (C. C. A. Alaska, 1922) 282 F. 604.

An information charging defendant with unlawful possession of liquor in a named county and district has been held to sufficiently state the place of possession. Dukich v. U. S. (C. C. A. Wash. 1924) 296 F. 691.

Indictment alleging that defendants, "in the district and division aforesaid," had possession of described liquor, held not defective, because not stating where or how defendants possessed the liquor. Pane v. U. S. (C. C. A. Neb. 1924) 2 F. (2d) 855.

Indictment charging possession of "intoxicating liquor for beverage purposes" held not defective for failure to allege that such liquor was "fit" for beverage purposes. Palmer v. U. S. (C. C. A. Ky. 1925) 6 F.(2d) 145.

A count of an indictment alleging that defendant unlawfully had in his possession 500 cases of whisky, which was in the custody of the American Railway Express Company in a car marked and known as "P. R. R. 2471," was held sufficient, notwithstanding the objection that possession by defendant was negatived, as the quoted words might be rejected as surplusage. Anderson v. U. S. (C. C. A. N. Y. 1923) 294 F. 593.

89. —— Transportation.—An information charging that defendant did "unlawfully transport in a Buick automobile certain intoxicating liquor" charges the offense specifically described in this section. Healey v. U. S. (C. C. A. Pa. 1921) 276 F. 711; Daley v. U. S. (C. C. A. Pa. 1921) 276 F. 713; Felmun v. U. S. (C. C. A. Pa. 1921) 276 F. 713.

In a prosecution for transporting intoxicating liquor, a motion to quash the indictment because the state law was in conflict with the federal law on the subject was held properly overruled. Rozier v. State (1921) 234 S. W. 666, 90 Tex. Cr. R. 337.

An indictment charging that defendant "unlawfully did transport" liquor was held sufficient, without alleging that he "willfully and knowingly" transported. Moseley v. U. S. (C. C. A. Tenn. 1925) 4 F.(2d) 381, certiorari denied Mosely v. U. S. (1925) 45 S. Ct. 510, 268 U. S. 690, 69 L. Ed. 1159.

Indictment charging unlawful transportation of intoxicating liquor held sufficient, without specific allegation that liquor was fit for beverage purposes. Pontiff v. U. S. (C. C. A. Mass. 1925) 9 F.(2d) 29.

90. —— Nuisances.—An information charging that defendants, in violation of this section, maintained a public nuisance, in that they sold and kept for sale for beverage purposes on described premises intoxicating liquor, follows the language of the statute, with sufficient description to inform the defendant of the offense charged, and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution, and is sufficient. Young v. U. S. (C. C. A. Cal. 1921) 272 F. 967.

91. —— Conspiracy.—In an indictment for conspiracy to violate this Act, it is not necessary to set forth a scheme or the means by which the conspiracy should be carried into execution. U. S. v. Drawdy (D. C. Fla. 1923) 288 F. 567.

Indictment for conspiracy to violate National Prohibition Act (incorporated in this title) need not allege that liquors were fit, sold, transported, or possessed for beverage purposes. Belvin v. U. S. (C. C. A. Va. 1926) 12 F.(2d) 548, certiorari denied (1926) 47 S. Ct. 98, 71 L. Ed. ——.

Charge of conspiracy to violate National Prohibition Act (incorporated in this title) is insufficient to charge conspiracy to commit offense against United States. U. S. v. Eisenminger (D. C. Del. 1926) 16 F.(2d) 816.

SUFFICIENCY OF PARTICULAR INDICTMENTS

Indictment for conspiracy to smuggle, transport, and sell intoxicating liquors, facilitate their transportation, and carry on business of wholesale liquor dealer without paying special tax, is not bad as to its other averments, because averment as to conspiracy not to pay special tax states no offense. Bailey v. U. S. (C. C. A. Ga. 1925) 5 F.(2d) 437, certiorari dismissed (1925) 46 S. Ct. 12, 269 U. S. 589, 70 L. Ed. 427.

Indictment for conspiracy to violate National Prohibition Act (incorporated in this title) by manufacture of beer, and unlawful removal and disposal thereof, held insufficient. U. S. v. Eisenminger (D. C. Del. 1926) 16 F.(2d) 816.

That some of the defendants charged in an indictment for conspiracy to violate the National Prohibition Act (incorporated in this title) as shown by the averments were the intended purchasers of the liquor, which purchase is not in itself an offense, held not to render the indictment demurrable as to such defendants, where the ultimate purpose of the conspiracy as charged, to which such defendants were parties, was to effect the unlawful sale. U. S. v. Slater (D. C. Pa. 1922) 278 F. 266.

In view of this section forbidding the transportation and possession of intoxicating liquor, except as therein authorized, and of regulation No. 60, forbidding the purchasing, etc., for nonbeverage purposes without a permit, an indictment charging conspiracy with F. and others to sell to F. whisky fit for beverage purposes, when defendant had no permit, and F. had none to make a further sale, sufficiently charged a conspiracy to commit an offense against the United States, though buying intoxicating liquor is not a crime. U. S. v. Vannatta (D. C. N. Y. 1922) 278 F. 559, affirmed, Vannata v. U. S. (C. C. A. 1923) 289 F. 424.

Counts of an indictment charging that defendants conspired to possess intoxicating liquor with intent to use, in violation of the National Prohibition Act (incorporated in this title), and to effect the object of the conspiracy had possession of 600 quarts of liquor with intent so to use it, and conspired to transport intoxicating liquor without permit or without making record, and to effect the object of the conspiracy, transported such liquor, were sufficient. Violette v. U. S. (C. C. A. Mont. 1922) 278 F. 163, certiorari denied (1922) 42 S. Ct. 382, 258 U. S. 626, 66 L. Ed. 798.

Indictments under section 88 of Title 18, Criminal Code and Criminal Procedure, charging conspiracy "to commit an offense against the United States, that is to say, to violate title 2 of the National Prohibition Act [incorporated in this title] in this, to wit, that the said [defendants] would then and there possess certain intoxicating liquors, to wit [stating number of cases of liquor], contrary to the provisions of said act," without stating the kind of liquor, or otherwise alleging which of the many provisions of the Prohibition Act [incorporated in this title] defendants conspired to violate, were held insufficient, as too general and not sufficiently informing defendants of the charge they were required to meet. And an indictment for conspiracy to violate the National Prohibition Act [incorporated in this title], by possessing "certain

intoxicating liquors [stating the number of cases], contrary to the provisions of said act," without alleging any facts to show that such possession was unlawful, either on account of the time, place, or purpose of the possession, or the character of the liquor, was also held not to charge an offense. U. S. v. Dowling (D. C. Fla. 1922) 278 F. 630.

Indictment under section 88 of Title 18, Criminal Code and Criminal Procedure, for conspiracy to violate this section and section 46 of this title and section 497 of Title 19, Customs Duties, laying the conspiracy at the Bay of San Francisco within the jurisdiction of the court, held to state facts sufficient to constitute an offense against the United States. Ford v. U. S. (Cal. 1927) 47 S. Ct. 531, 71 L. Ed. —, affirming judgment (C. C. A. 1926) 10 F.(2d) 339.

Indictment for conspiracy to violate Prohibition and Tariff Acts (incorporated in this title and chapter 3 of Title 19, Customs Duties), held not duplicitous. Ford v. U. S. (Cal. 1927) 47 S. Ct. 531, 71 L. Ed. —, affirming (C. C. A. 1926) 10 F.(2d) 339.

Indictment for conspiracy to transport and possess intoxicating liquor was held not objectionable, as containing untrue allegations that there were other conspirators unknown to grand jury. Lewis v. U. S. (C. C. A. Fla. 1925) 4 F.(2d) 520.

Counts charging conspiracy to defraud the United States of customs duties and internal revenue taxes, by fraudulent withdrawal of liquor from bonded warehouse, and to violate the National Prohibition Act (incorporated in this title), alleging in general the legal effect of conspiracy, and stating as introduction to details of agreement that "it was a part of said conspiracy" that conspirators should do acts enumerated, held sufficient as against contention that conspiracy was nowhere set up as a whole. Becher v. U. S. (C. C. A. N. Y. 1924) 5 F.(2d) 45, certiorari denied (1925) 45 S. Ct. 462, 267 U. S. 602, 69 L. Ed. 808.

The counts of an indictment charging conspiracy to violate this section, in which the charging part of each count omitted to allege the place where the alleged conspiracy was committed, was not defective, where the overt acts were laid within the district in which the indictment was found, and therefore brought the offenses within the jurisdiction of the trial court. Pope v. U. S. (C. C. A. Pa. 1923) 289 F. 312, certiorari denied (1923) 44 S. Ct. 33, 263 U. S. 703, 68 L. Ed. 515.

An indictment charging generally a conspiracy to possess, transport, and sell intoxicating liquor in violation of the National Prohibition Act (incorporated in this title) followed by a sufficient specification of an overt act, has been held good. Martin v. U. S. (C. C. A. W. Va. 1924) 299 F. 287. In Miller v. U. S. (C. C. A. Ohio, 1924) 300 F. 529, certiorari denied (1924) 45 S. Ct. 123, 266 U. S. 624, 69 L. Ed. 474, holding an indictment sufficient, the following extract from the opinion states the objections made to the sufficiency of the indictment: "The indictment is attacked as insufficient, because it states conclusions, does not state all the necessary elements of the crime, relies upon the overt acts to make it complete, does not negative facts which might make the possession legally permissible, is in too general terms, would not prevent a subsequent conviction, and does not enable the defendant to prepare for trial. Omitting unnecessary verbiage, the indictment, filed June 7, 1923, is as follows: 'That Philip Miller, Jake Greenberg, and W. Josak * * * heretofore, on or about June 5, 1923, at Toledo, Ohio, * * * in the division and district aforesaid, * * * did unlawfully, willfully, knowingly, and feloniously conspire, combine, confederate, and agree together with one another and each with the other, to commit an offense against the United States, to wit, to violate the * * * National Prohibition Act [incorporated in this title], particularly title 2 thereof, in that they would unlawfully, willfully, and knowingly * * * manufacture, possess, transport, barter, and sell intoxicating liquors and distilled spirits, the same then and there containing one-half of one per cent. of alcohol by volume and then and there being fit for beverage purposes, in violation and contrary to the provisions of the National Prohibition Act [incorporated in this title].'

"This indictment closely fixes date and place and is sufficient against all the objections urged, which are all covered by our recent decisions. Dierkes v. U. S. (C. C. A. Ohio, 1921) 274 F. 75, 78, 79; Rudner v. U. S. (C. C. A. Ohio, 1922) 281 F. 516; Robilio v. U. S. (C. C. A. Tenn. 1923) 291 F. 975; Remus v. U. S. (C. C. A. Ohio, 1923) 291 F. 501; De Witt v. U. S. (C. C. A. Ohio, 1923) 291 F. 995, 998; Hindman v. U. S. (C. C. A. Tenn. 1923) 292 F. 679; Huth v. U. S. (C. C. A. Ky. 1924) 295 F. 35. Without any help from the overt acts, there is an allegation of every fact necessary to make the offense. As pointed out in the Huth Case, supra, a judgment on such an indictment is a bar to subsequent prosecution for any offense which could have been proved under the indictment, and the very generality of its terms, therefore, makes it the more ample protection. The objection that such general statements do not give defendant sufficient knowledge to enable him to prepare for trial is no longer of its former importance, since most defects of this character—certainly any appearing in this indictment—can now be cured by obtaining a bill of particulars."

Indictment for conspiracy to violate Prohibition Act (incorporated in this title) was held not demurrable because it failed to allege in terms that offense was to be committed within the United States. U. S. v. Frank (D. C. R. I. 1926) 12 F.(2d) 796.

Indictment for conspiracy to violate National Prohibition Act (incorporated in this title) following statute, and fairly informing defendants of character of offense charged, was held sufficient. Belvin v. U. S. (C. C. A. Va. 1926) 12 F.(2d) 548, certiorari denied (1926) 47 S. Ct. 98, 71 L. Ed. ——.

An indictment charging conspiracy to violate "National Prohibition Act" (incorporated in this title) duly charging overt acts, held sufficient as against objection that it failed to set forth facts as to particular manner in which act would be violated. Haynes v. U. S. (C. C. A. N. Y. 1925) 4 F.(2d) 889, certiorari denied Schopp v. U. S. (1925) 45 S. Ct. 638, 268 U. S. 703, 69 L. Ed. 1166, and Van Engelen v. U. S. (1925) 45 S. Ct. 638, 268 U. S. 703, 69 L. Ed. 1166.

Indictment charging conspiracy to violate the Volstead Act (incorporated in this title) in that defendants would unlawfully possess, sell, transport, etc., was held not so utterly lacking in charging an offense as to take it out of the rule against considering its sufficiency on application for warrant of removal of a defendant to the district where indictment was found, or on his petition for habeas corpus. U. S. ex rel. Clark v. Mathues (D. C. Pa. 1927) 17 F.(2d) 187.

Indictment for conspiracy to manufacture, unlawfully remove, and dispose of beer was held defective in its reference to manufacture, not charged to be unlawful. U. S. v. Eisenminger (D. C. Del. 1926) 16 F. (2d) 816.

Dismissal of petition for warrant of removal, on ground that indictment purporting to charge general conspiracy to violate National Prohibition Act, tit. 2 (incorporated in this title) and enumerating numerous overt acts was practically void, was held unwarranted. Snyder v. Hunter (App. D. C. 1925) 8 F.(2d) 902, motion to recall mandate denied (1926) 11 F.(2d) 336, 56 App. D. C. 164.

Count of indictment held sufficient, as charging single conspiracy to commit offenses of unlawfully importing intoxicating liquor and receiving, concealing, possessing, and selling such liquor. Hartson v. U. S. (C. C. A. N. Y. 1926) 14 F. (2d) 561.

Refusal to strike paragraphs of indictment charging particular overt acts for reason that persons aiding in such acts were separate from defendants, was held not error, such question being for jury. Fisher v. U. S. (C. C. A. R. I. 1925) 8 F. (2d) 978, certiorari denied (1926) 46 S. Ct. 482, 271 U. S. 666, 70 L. Ed. 1140.

For indictment for conspiracy to violate the prohibition against the importation of intoxicating liquors into the United States see Simpson v. U. S. (C. C. A. Alaska, 1923) 289 F. 188, certiorari denied (1923) 44 S. Ct. 35, 263 U. S. 707, 68 L. Ed. 517, wherein it was said:

"We find no merit in the contention that the indictment was insufficient. It advised the defendants with reasonable certainty of the crime with which they were charged. Williamson v. United States (Or. 1908) 207 U. S. 425, 28 S. Ct. 163, 52 L. Ed. 278. Its meaning is plain, a person of ordinary intelligence could not be misled as to the nature of the charge, and the averments are sufficient to enable the defendant to prepare his defense and, in the event of acquittal, to plead the judgment in bar of a second prosecution for the same offense."

An indictment under section 88 of Title 18, Criminal Code and Criminal Procedure, charging conspiracy to violate this act and a regulation of the Commissioner of Internal Revenue, charges an offense, since it charges a conspiracy to commit a crime and the violation of the regulation would defraud the United States. Brolaski v. U. S. (C. C. A. Cal. 1922) 279 F. 1, certiorari denied (1922) 42 S. Ct. 381, 258 U. S. 625, 66 L. Ed. 797, and Newton v. U. S. (1922) 42 S. Ct. 589, 259 U. S. 586, 66 L. Ed. 1076.

An indictment for conspiracy to unlawfully possess intoxicating liquor containing more than one-half of 1 per centum of alcohol by volume and fit for beverage purposes held sufficient to charge an offense. U. S. v. Bockol (D. C. Del. 1924) 3 F.(2d) 197. See Bockol v. U. S. (C. C. A. Del. 1925) 6 F.(2d) 795.

92. —— Second and subsequent offenses.—See, also, notes to section 46 of this title.

Indictment alleging that defendant had been informed against "as a first offense," and pleaded guilty of possession, under this section on a particular date, and on later date was informed against "as a second offense," for possession of intoxicating liquor, and thereafter convicted, and alleged that third offense charged by indictment was committed after such conviction, held sufficient to support conviction as for a third offense. Palmer v. U. S. (C. C. A. Ky. 1925) 6 F.(2d) 145.

An indictment for unlawful possession of intoxicating liquor, in violation of this section and section 46 of this title, held insufficient as to prior offenses sought to be pleaded, in that the first and second offenses were not directly and positively charged, but merely stated parenthetically and by recital. Schooley v. U. S. (C. C. A. Ark. 1925) 4 F.(2d) 767.

Indictment seeking to charge prior violation of this section and section 46 of this

title, which alleges accused entered plea of guilty to similar charge, is wholly insufficient to allege conviction; a plea of guilty not being a "conviction," but conviction consisting of judgment on plea or verdict of guilty. Id.

Indictment for violation of this section and section 46 of this title, as felony because of successive offenses, held defective in not stating in what court former plea of guilty was entered, and in not stating facts as of record as to whether defendant was in fact found guilty and convicted of offense. Id.

93. Duplicity.—See U. S. v. Cleveland (D. C. Ala. 1922) 281 F. 249.

An information charging the sale of one pint of wine and two drinks of whisky to a named person, for which such person paid defendant a specified sum, has been held not to be subject to demurrer or motion to quash on the ground of duplicity; the presumption from the charge as found in the information being that there was one sale of two liquors. Rolando v. U. S. (C. C. A. Utah, 1924) 1 F.(2d) 110.

Single count of indictment charging conspiracy to commit several offenses against National Prohibition Act (incorporated in this title), is not bad for duplicity. Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F. (2d) 505, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. —.

94. Consolidation of indictments.—Consolidation for trial of indictments for unlawful possession and sale of and conspiracy to transport, intoxicating liquor, held within court's discretion. Goldberg v. U. S. (C. C. A. Ga. 1924) 297 F. 98.

95. Pleas.—In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), evidence held not to sustain accused's contention that plea of guilty entered at close of government's evidence was result of overreaching and deception by accused's counsel, and denial of motion to set aside conviction and enter plea of not guilty was not abuse of discretion. Gleckman v. U. S. (C. C. A. Minn. 1926) 16 F.(2d) 670.

Evidence respecting guilt of accused, who pleaded guilty to indictment charging conspiracy to violate National Prohibition Act (incorporated in this title) held sufficient to go to jury, so that court did not abuse its discretion in denying motion to set aside conviction and sentence and to change plea to not guilty. Id.

Motion to strike pleas in abatement interposed to indictment charging conspiracy to violate these sections, granted. U. S. v. Olmstead (D. C. Wash. 1925) 7 F. (2d) 756.

96. Election.—See, also, notes to section 49 of this title.

Court's order at close of government's case, requiring government to elect which of two defendants, jointly charged with a liquor offense in violation of the National Prohibition Act (incorporated in this title), it would prosecute, held not prejudicial, in view of court's discretion in matter, not taken away by section 557 of Title 18, Criminal Code and Criminal Procedure. U. S. v. Mullen (D. C. La. 1925) 7 F.(2d) 246.

97. Issues and proof in general.—Permitting evidence relative to defendants' possession of intoxicating liquor on day after date alleged in information was held proper, where defendants had testified that presence at distillery was innocent. Lynch v. U. S. (C. C. A. S. C. 1926) 12 F. (2d) 193.

Evidence of acts in furtherance of conspiracy by defendants' corporation held admissible, where indictment charged that defendants conspired with parties to grand jury unknown. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —.

Where time is not element of offense, proof of commission of crime any time before finding of indictment and within statute of limitations is sufficient, and proof of sale of intoxicating liquor on January 5, 1924, was sufficient to sustain conviction under indictment charging sale on January 5, 1923. Cornett v. U. S. (C. C. A. Okl. 1925) 7 F.(2d) 531.

Where indictment for conspiracy to violate National Prohibition Act (incorporated in this title) charged but one combination or conspiracy, which had many different objects, no accused could be convicted thereunder, unless shown to be member of, or party to, such conspiracy. Terry v. U. S. (C. C. A. Cal. 1925) 7 F. (2d) 28.

In prosecution for sale of liquor under the Volstead Act (incorporated in this title), the specific date of sale named in the indictment is not material. Rupinski v. U. S. (C. C. A. Mich. 1925) 4 F.(2d) 17.

Under section 550 of Title 18, Criminal Code and Criminal Procedure, which makes an aider or abetter chargeable as a principal, an information charging defendant with unlawful possession and sale of liquor is supported by proof of possession and sale by an employee in defendant's presence and with his knowledge. Dukich v. U. S. (C. C. A. Wash. 1924) 296 F. 691.

A charge of having in possession liquor on a specified date is supported by proof of possession at any time before the finding of the indictment. Jones v. U. S. (C. C. A. S. C. 1924) 296 F. 632.

An averment in an indictment that the place where an illegal sale of liquor was made was in Chicago was held immaterial, where the sale proved, while not within the city, was in the same district.

Heitler v. U. S. (C. C. A. Ill. 1922) 280 F. 703.

An indictment charging the defendants with selling intoxicating liquors in violation of this section is not supported by evidence showing that the defendants were guilty of unlawfully transporting such liquors. Einziger v. U. S. (C. C. A. N. J. 1921) 276 F. 905.

Under the National Prohibition Act (incorporated in this title) an allegation of an indictment for selling intoxicating liquor that defendant was engaged in the business of a retail liquor dealer need not be proved. Farley v. U. S. (C. C. A. Wash. 1921) 269 F. 721.

An information charging defendant with a sale of cider containing more than one-half of 1 per cent. of alcohol was held not sustained by evidence of the sale of sweet cider containing less than such per cent. of alcohol, although it later developed a larger content. U. S. v. Dodson (D. C. Cal. 1920) 268 F. 397.

In trial for conspiracy to violate National Prohibition Act (incorporated in this title), admission of prohibition agent's testimony, that he arrested defendant and seized liquor being transported by him on date seven months before that on which conspiracy was alleged to have begun, held error and prejudicial; such evidence being wholly collateral to issue as to place, time and circumstances of conspiracy charged. Crowley v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 118.

In a prosecution for conspiracy to violate the National Prohibition Act (incorporated in this title) and for transporting and possessing intoxicating liquors in violation of that act, evidence as to the transportation and possession of such liquors which varied from the overt acts alleged in the conspiracy charge was competent on the charges of transportation and possession, when confined by the court's charge thereto. Alderman v. U. S. (C. C. A. Fla. 1922) 279 F. 259, certiorari denied (1922) 42 S. Ct. 586, 259 U. S. 584, 66 L. Ed. 1075.

98. Variance.—Proof that a sale of liquor charged in the indictment as having been made to John F. Burke was made to J. L. Burk was held not to show a material variance, in view of section 556 of Title 18, Criminal Code and Criminal Procedure. Saucedo v. U. S. (C. C. A. Tex. 1920) 268 F. 830.

Where the indictment charged that liquor was transported on a vessel named "Mollie O.," testimony by a witness that the vessel was the "Molly" was not objectionable, as a variance from the indictment. Alderman v. U. S. (C. C. A. Fla. 1922) 279 F. 259, certiorari denied (1922) 42 S. Ct. 586, 259 U. S. 584, 66 L. Ed. 1075.

In a prosecution for conspiracy to violate this section a variance between the allegation of the date of the sale of liquor and the proof of the date of such sale is immaterial. Pope v. U. S. (C. C. A. Pa. 1923) 289 F. 312, certiorari denied (1923) 44 S. Ct. 33, 263 U. S. 703, 68 L. Ed. 515.

Variance between allegation of prior offense and proof thereof in prosecution for third offense held not a fatal variance. McGill v. U. S. (C. C. A. Tex. 1926) 10 F. (2d) 972.

Irregularity consisting of variance between allegation and proof as to prior offense held cured by verdict. Id.

There was no fatal variance between information for sale or possession of intoxicating liquor, to wit, gin, and evidence that liquor was alcohol or moonshine. Bronstein v. U. S. (C. C. A. Colo. 1927) 17 F.(2d) 12.

EVIDENCE

111. Judicial notice.—It is matter of common knowledge, of which judicial notice can be taken, that beer, in brewing, will almost certainly develop alcoholic content in excess of that permitted by law to be sold. Levin v. Blair (D. C. Pa. 1927) 17 F.(2d) 151.

112. Presumptions and burden of proof.—A defendant's plea of not guilty places the burden on the government to establish his guilt on each count of the indictment beyond a reasonable doubt. Stafford v. U. S. (C. C. A. Ky. 1924) 300 F. 537.

Thus burden rests on government to prove importation of liquor within judicial district where prosecution was had. Romano v. U. S. (C. C. A. N. Y. 1925) 9 F.(2d) 522.

And in prosecution under section 88 of Title 18, Criminal Code and Criminal Procedure, for conspiracy to violate the National Prohibition Act (incorporated in this title) and section 497 of Title 19, Customs Duties, government must prove that defendants were parties to crime committed in the district. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —.

A confession is not presumed to be involuntary, and no burden rests upon the government to establish its voluntary character. Gray v. U. S. (C. C. A. Cal. 1926) 9 F.(2d) 337.

Court was not authorized to say that witnesses testifying concerning "moonshine" did not mean moonshine whisky, as affects necessity for proof of alcoholic content. Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F.(2d) 505, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. —.

It is unnecessary to prove more than one of the overt acts alleged, or that more than one conspirator took part in it. Burkhardt v. U. S. (C. C. A. Ohio, 1926) 13 F.(2d) 841.

Proof of unlawful alcoholic content of liquor trafficked in has been held not necessary on charge of conspiracy to violate National Prohibition Act (incorporated in this title). Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F.(2d) 505, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. —.

Proof of violation of revenue laws has been held not necessary to conviction under National Prohibition Act (incorporated in this title). Mansbach v. U. S. (C. C. A. N. J. 1926) 11 F.(2d) 221.

To warrant conviction against two of several defendants for conspiring unlawfully to transport and sell whisky for beverage purposes, in violation of this section, government is not required to establish guilt of any other individual defendant. Langley v. U. S. (C. C. A. Ky. 1925) 8 F.(2d) 815, certiorari denied (1926) 46 S. Ct. 204, 269 U. S. 588, 70 L. Ed. 427.

Acts of coconspirators, constituting part of means employed to accomplish object of conspiracy in violation of this section, have been held none of them essential elements of conspiracy; hence proof thereof was not essential to proof of guilt. Id.

Under an indictment for violation of this act it is not necessary to prove that the defendant was engaged in the business of a retail liquor dealer, it being sufficient to show that he sold liquor in any quantity. Farley v. U. S. (C. C. A. Wash. 1921) 269 F. 721.

In a prosecution for selling intoxicating liquor, where the indictment alleged the liquor was alcohol mixed with some substance to the grand jury unknown, and there was no evidence that the grand jurors knew or were informed what that substance was, there was a presumption that it was unknown to the grand jury, which dispensed with the necessity of proving that allegation of the indictment. Ford v. U. S. (C. C. A. Tex. 1921) 269 F. 609.

113. —— Defensive matters.—Legal presumption is that drug store owner, having lawful permit to sell whisky was innocent of unlawful sale or possession thereof. Brock v. U. S. (C. C. A. Mo. 1926) 12 F.(2d) 370.

All acts involving the sale of intoxicating liquor are presumptively illegal, until brought within the exceptions of the National Prohibition Act (incorporated in this title) or until shown to have been permitted by federal authority. Lundy v. Orr (1923) 199 N. Y. S. 480, 205 App. Div. 296.

In prosecution under federal Volstead Act (incorporated in this title) charging illegal purchase of intoxicating liquor, it is necessary for defendant to show that possession has been legally acquired through medium of a physician's prescription. Commonwealth v. Berdenella (1927) 136 A. 791, 288 Pa. 510.

In a prosecution for sale of liquor in violation of this Act, the burden rests on defendant to prove his possession of a permit. Albert v. U. S. (C. C. A. Ohio, 1922) 281 F. 511.

It has been declared that in a prosecution for transporting liquor without a permit the government would not have to prove the want of the permit in order to make out a prima facie case. But if the defendant should introduce any substantial evidence tending to show that the transportation had been authorized by a permit, the government would then have to introduce evidence that no permit was issued, or that it was obtained by fraud, or that it did not apply to the act of transportation charged. U. S. v. Turner (D. C. Va. 1920) 266 F. 248.

In a prosecution for transportation of alcohol without the permit required by this Act, it is not incumbent on the government to prove that defendants had no permit, which, if it was issued, presumably was in defendants' possession or their control. Sharp v. U. S. (C. C. A. La. 1922) 280 F. 86, certiorari denied Carollo v. U. S. (1922) 43 S. Ct. 92, 260 U. S. 730, 67 L. Ed. 485.

Under an information for unlawful possession of intoxicating liquors, the prosecution is not required to prove that defendant did not have a permit authorizing such possession. Lauri v. U. S. (C. C. A. Ohio, 1922) 278 F. 934.

In prosecution for unlawful transportation of intoxicating liquor as second offense, under National Prohibition Act (incorporated in this title) government need not prove that defendant did not have permit to transport the liquor. Altshuler v. U. S. (C. C. A. Del. 1925) 3 F. (2d) 791.

114. Admissibility of evidence—In general.—Evidence that government agents, seeing truck loaded with whisky from motorboat drive off, seized person in charge of boat, and defendants with another truck and automobiles, held to render admissible evidence that defendants were armed, and that automobiles were adapted for trucking purposes. Fisher v. U. S. (C. C. A. R. I. 1925) 8 F.(2d) 978, certiorari denied (1926) 46 S. Ct. 482, 271 U. S. 666, 70 L. Ed. 1140.

In prosecution for conspiracy to import liquor and to transport same where some of defendants were former officers, evidence as to another defendant's recent bootlegging importations was not prejudicial as to defendants whose rights were preserved by appropriate instructions, and was properly received against defendant in question as material on issue of intent in procuring officers to seize liquor involved. Parmenter v. U. S. (C. C. A. Mich. 1924) 2 F.(2d) 945, certiorari denied (1925) 45 S. Ct. 514, 268 U. S. 697, 69 L. Ed. 1163.

Testimony in reference to liquor taken from person of one of defendants was properly admitted against him, in prosecution for conspiracy and for unlawful possession. Keith v. U. S. (C. C. A. Ky. 1926) 11 F.(2d) 933.

In prosecution for conspiracy to import intoxicating liquor and to transport same, where defendants, some of whom were officers, filed written report of liquor seized with sheriff's assistants, and then stated to them substance of such report, offer to prove such oral statements was held properly rejected, where written report was not produced and failure to produce it was unexcused. Parmenter v. U. S. (C. C. A. Mich. 1924) 2 F.(2d) 945, certiorari denied (1925) 45 S. Ct. 514, 268 U. S. 697, 69 L. Ed. 1163.

Testimony about liquor secured from vessel and delivered to defendant held admissible. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. ——.

Evidence that third person was clandestinely engaged in producing from denatured alcohol and selling pure alcohol fit for beverage purposes, and that defendants each purchased a large amount of such liquor, and caused removal of same with such third person's knowledge and connivance, held competent and substantial evidence of conspiracy to transport liquor unlawfully for beverage purposes, without proof of chemical examination. Betz v. U. S. (C. C. A. Ky. 1924) 2 F.(2d) 552.

In prosecution for conspiracy to transport and sell whisky for beverage purposes, certain testimony held admissible to show what and how much liquor was subject of conspiracy. Langley v. U. S. (C. C. A. Ky. 1925) 8 F.(2d) 815, certiorari denied (1926) 46 S. Ct. 204, 269 U. S. 588, 70 L. Ed. 427.

Testimony as to difference in current prices of whisky when sold for lawful or unlawful purposes held admissible in prosecution under this section. Id.

Refusal to permit defendants to testify they did not believe their acts unlawful held not erroneous. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. ——.

In prosecution for sale of intoxicating liquor, there was no reversible error in excluding testimony of witness that at one time he bought nonintoxicating grape juice from defendant. Morgan v. U. S. (C. C. A. W. Va. 1923) 294 F. 82.

Where defendant was charged with keeping and selling liquor at a specified place, evidence of delivery of liquor at that place, for which defendant paid, was competent. Marron v. U. S. (C. C. A. Cal. 1927) 18 F.(2d) 218, certiorari granted (1927) 47 S. Ct. 574.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title) and offenses against Revenue laws applicable to manufacture of spirituous liquor, evidence that prohibition agents who destroyed still had themselves protected and assisted others in violating the law was held inadmissible, since, although defendant might show that still was placed on his property without his knowledge, he could not, in support of such defense, prove, under guise of motive, isolated acts of law violation by prohibition officers. Godsey v. U. S. (C. C. A. Tenn. 1927) 17 F.(2d) 877.

Trial court's refusal to permit accused in liquor prosecution to inquire into case against his employee, previously tried on similar, but distinct, charges, was held not prejudicial. Ramos v. U. S. (C. C. A. Porto Rico 1926) 12 F.(2d) 761.

Under an information charging an unlawful sale of whisky by defendant, the admission of evidence that the sale was made by another was held not error, where there was evidence that such other was defendant's bartender, and tending to show that defendant delivered the whisky to the bartender and had full knowledge of the sale. Yaffee v. U. S. (C. C. A. Ohio, 1921) 276 F. 497, writ of error dismissed (1922) 42 S. Ct. 588, 259 U. S. 590, 66 L. Ed. 1079.

Proof of possession for medicinal purposes, not accompanied with proof of permit, was held properly rejected. State v. Semeraro (1926) 131 A. 798, 99 Vt. 275.

In prosecution of many defendants for conspiracy to violate Prohibition Act (incorporated in this title) admission of testimony of newspaper reporter that he had visited soft drink parlors and homes of vice, where intoxicating liquors were openly sold, was held not error, nor violative of substantial rights of parties, under section 391 of Title 28, Judicial Code and Judiciary. Allen v. U. S. (C. C. A. Ind. 1925) 4 F.(2d) 688, certiorari denied Hunter v. U. S. (1925) 45 S. Ct. 352, 267 U. S. 597, 69 L. Ed. 806, Mullen v. U. S. (1925) 45 S. Ct. 353, 267 U. S. 598, 69 L. Ed. 806, and Johnson v. U. S. (1925) 45 S. Ct. 509, 268 U. S. 689, 69 L. Ed. 1158.

In prosecution under section 88 of Title 18, Criminal Code and Criminal Procedure, of city and judicial officials and owners of soft drink establishments for conspiracy to violate National Prohibition Act (incorporated in this title), evidence of campaign contribution under fictitious names by operators of soft drink places, evidence as to frequency and character of prosecutions in city and punishment imposed, and evidence showing the maintenance of houses of ill fame wherein liquor was sold, was held properly admit-

ted. Allen v. U. S. (C. C. A. Ind. 1925) 4 F.(2d) 688, certiorari denied Hunter v. U. S. (1925) 45 S. Ct. 352, 267 U. S. 597, 69 L. Ed. 806, Mullen v. U. S. (1925) 45 S. Ct. 353, 267 U. S. 598, 69 L. Ed. 806, and Johnson v. U. S. (1925) 45 S. Ct. 509, 268 U. S. 689, 69 L. Ed. 1158.

Where police officer, charged with others with conspiracy to violate National Prohibition Act (incorporated in this title), testified that he had never been able to gain admittance to flat he was supposed to have had under observation, it was not error to admit, in rebuttal, testimony of another witness that witness had seen officer in flat and that officer had seen witness take a drink. Marron v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 251.

Permitting state to ask waiter for defendant, in place where liquors were alleged to have been kept and sold, what his duties were, was held not error. West v. U. S. (C. C. A. Wash. 1924) 2 F.(2d) 201.

Testimony by prohibition agent as to purchases of liquor at defendant's place by him and another agent when defendant was not present, was held not erroneously admitted. Id.

In conspiracy prosecution, evidence held sufficiently connected with conspiracy to be admissible. Ford v. U. S. (Cal. 1927) 47 S. Ct. 531, 71 L. Ed. —, affirming (C. C. A. 1926) 10 F.(2d) 339.

Where the defense of entrapment was presented in a prosecution for violation of the National Prohibition Act (incorporated in this title) the prosecution was properly permitted to show in rebuttal that the officers acted on information that defendants were reputed violators of the law. Silk v. U. S. (C. C. A. Neb. 1926) 16 F.(2d) 568, opinion modified on petition for rehearing (1927) 19 F.(2d) 73.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), bank cashier's testimony held competent to show that particular drafts payable to one alleged conspirator were sold and delivered by the bank to another. Hoxie v. U. S. (C. C. A. Alaska, 1926) 15 F.(2d) 762, certiorari denied (1927) 47 S. Ct. 459, 71 L. Ed. —.

In a prosecution against an attorney, a county sheriff and others for conspiracy to violate this Act, testimony of a person employed to sell liquor that, on receiving a telephone call, his employer would go to defendant attorney's office, and on returning tell him to take the liquor away, and that thereafter officers would come and search, and that they were never searched by state officers without receiving previous information thereof, has been held competent, regardless of whether the employer was a coconspirator. Grant v. U. S. (C. C. A. Me. 1924) 299 F. 251.

Ordinarily liquor kept for sale and in possession of defendants is admissible in evidence. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —.

Under treaty between United States and Great Britain, art. 2, § 3, permitting arrest of whisky runners and vessels within one hour's sailing distance from coast, and providing that, if some other vessel is to be used in transporting liquor, then speed of such other vessel shall determine distance, on seizure of British vessel and prosecution of crew for intent to import intoxicating liquor, government may prove speed of such boats as are ordinarily used in that vicinity to determine distance of vessel from coast, where actual boats used cannot be identified. U. S. v. Henning (D. C. Ala. 1925) 7 F.(2d) 488, reversed on other grounds Hennings v U. S. (C. C. A. 1926) 13 F.(2d) 74.

Evidence that officer without warrant arrested accused while he was in automobile or about to leave it, with intoxicating liquor in his possession, was admissible, where officer had probable cause for belief that intoxicating liquors were being transported. Ryan v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 667.

115. —— **Evidence obtained by search.**—Evidence of liquor, bottles, and apparatus found on defendant's premises in prior searches was properly received, in prosecution for conspiracy to violate prohibition laws and for unlawful possession. Keith v. U. S. (C. C. A. Ky. 1926) 11 F. (2d) 933.

Where a person has been arrested for intoxication, whisky obtained on a search of his person is not obtained by "unreasonable search" and is admissible in evidence on a prosecution against him for a violation of this section. U. S. v. Murphy (D. C. N. Y. 1920) 264 F. 842.

In prosecution under this section, for possessing and transporting intoxicating liquor, testimony of police officers of the city of New York, who made the arrest and seizure of liquor, was not inadmissible, under Const. Amends. 4, 5, because they were without search warrants. Greenberg v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 65.

In a prosecution for transporting intoxicating liquor, evidence held sufficient to warrant finding that accused was arrested by city and state officers, aided by a federal officer, and that the state or city officers undertook to act in pursuance of state law, thus rendering admissible evidence as to liquor found. Park v. U. S. (C. C. A. N. H. 1924) 294 F. 776.

116. —— **Other offenses.**—See, also, note 97 under this section.

In a prosecution for the unlawful possession of liquor, it may be shown, on cross-examination of defendant, to affect his credibility, that he was previously

convicted of a similar offense. Parks v. U. S. (C. C. A. S. C. 1924) 297 F. 834.

In prosecution for sale of liquor under Volstead Act (incorporated in this title) evidence of other sales is inadmissible, where intent, plan, or motive is not in question. Rupinski v. U. S. (C. C. A. Mich. 1925) 4 F.(2d) 17.

In prosecution for unlawful possession and sale of intoxicating liquor and maintenance of common nuisance, evidence of prior sales is admissible. Merrill v. U. S. (C. C. A. Or. 1925) 6 F.(2d) 120.

Evidence of similar offenses is incompetent, in prosecution for selling alcohol without prescription. Anderson v. U. S. (C. C. A. Minn. 1927) 18 F.(2d) 404.

Evidence relating to accounts and settlements for liquor in previous transactions between defendant in liquor conspiracy case and another held admissible. Campanelli v. U. S. (C. C. A. Alaska, 1926) 13 F.(2d) 750.

In liquor prosecution, admission of evidence of defendant's conviction for a former violation of prohibition laws was held prejudicial error. Cobb v. State (1925) 103 So. 387, 20 Ala. App. 542.

In prosecution for conspiracy to transport and sell whisky, admission of testimony of coconspirator as to his relations with defendant prior to time covered in indictment held not error, where limited to its bearing on matters in indictment. Langley v. U. S. (C. C. A. Ky. 1925) 8 F. (2d) 815, certiorari denied (1926) 46 S. Ct. 204, 269 U. S. 588, 70 L. Ed. 427.

Admitting evidence in prosecution for selling liquor and maintaining nuisance, that defendant was also keeping house of prostitution, not as proving separate offense, was held proper as limited by court. Harris v. U. S. (C. C. A. Mich. 1926) 13 F.(2d) 849.

Under an information charging defendant with illegal sale of whisky at his house, evidence that a still had been operated at a place three-quarters of a mile distant from the house, and that there was a path between the two places, held admissible. Carpenter v. U. S. (C. C. A. W. Va. 1922) 280 F. 598.

In a prosecution for possessing and selling liquor in violation of National Prohibition Act (incorporated in this title) admission of evidence of other sales, prior to the taking effect of the act, and not shown to have been connected with those charged, held error. Id.

Evidence as to liquor seized in residence of one charged with conspiracy to violate National Prohibition Act (incorporated in this title) in conduct of business at another place, was held relevant. Marron v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 251.

In prosecution under section 88 of Title 18, Criminal Code and Criminal Procedure for conspiracy to transport whisky contrary to National Prohibition Act (incorporated in this title) where accused explained various transactions on ground that it was part of work which he had undertaken as special investigator of prohibition situation, evidence of similar transactions not charged in indictment was held admissible to show intent of accused. Means v. U. S. (C. C. A. N. Y. 1925) 6 F.(2d) 975.

In prosecution for conspiracy to have and possess intoxicating liquors for sale, it was reversible error to admit evidence that defendant accepted a certain sum from witnesses, in order to pay it over to general prohibition agent as protection money, so that liquor shipments of other persons could be transported without hindrance; the conspiracy charged having ceased more than a month before such money was claimed to have been paid. Weil v. U. S. (C. C. A. Ga. 1924) 2 F.(2d) 145.

In Hazelton v. U. S. (C. C. A. Idaho, 1923) 293 F. 384, the facts were as follows:

Plaintiff in error was convicted under an information which in the third count charged that between June 1 and December 1, 1922, she maintained a public place where intoxicating liquor, commonly known as "moonshine" whisky, was sold, kept, and bartered. She was acquitted under other counts, which charged possession and sale, respectively. To review the conviction she brought writ of error. In support of the charge of maintaining a nuisance, the chief of police at Lewiston testified that about June 21st he searched the hotel kept by defendant, and found intoxicating liquor, arrested defendant, and took her to the police station. A police court record, containing a charge against defendant, was offered in evidence, and upon objection by defendant the record was excluded. The court, after an examination of the offered record, remarked that the charge appearing in the record was not of "having liquor." Thereupon, after the witness testified that the practice of the police was to make an oral charge in the police court, counsel for the prosecution asked the witness if, after the arrest of the defendant, he had made such an oral charge. Defendant objected, on the ground, already ruled upon by the court, that the charge against defendant made in the police court was different from that for which she was being tried. The court then stated that counsel for the prosecution was trying to get an explanation of the charge, and, over the objection and exception by defendant, permitted the witness to testify. Witness answered that he had charged the defendant with disorderly conduct, that she had pleaded guilty, and had paid a fine of $200. On these facts the court said:

"Doubtless a record of a prior judgment, and a plea of guilty of having kept in June, 1922, a place where intoxicating liquor was sold, would have been admis-

sible against defendant, upon the ground that such an offense was connected with the charge under investigation, as part of a continuing offense; but it was very prejudicial to allow the prosecution, as part of its case in chief, to introduce evidence of a plea of guilty of an apparently collateral offense. The evidence was not admissible as affording a legal inference of guilt of the crime for which defendant was being tried, and clearly its effect must have been to impress the minds of the jurors with the belief that the defendant was a woman of bad tendencies and unworthy.

"For the reason, therefore, that reception of the evidence conflicted with the firmly rooted rule that the prosecution may not initially assail defendant's character, the judgment must be reversed, and the cause remanded, with directions to grant a new trial."

117. —— Opinions, conclusions, and expert testimony.—A witness who is familiar with the taste of alcoholic liquors may give his opinion whether the liquid which he has tasted is intoxicating liquor of a certain name. Rolando v. U. S. (C. C. A. Utah, 1924) 1 F.(2d) 110, holding that a witness who had had only two and one-half months' experience in tasting and smelling liquor, but who stated that he had trained himself to know the taste and smell of different kinds of liquor, is qualified to testify that liquor tasted by him is moonshine whisky; the credibility of the witness and the weight of his testimony being for the jury.

Whether a sufficient foundation has been laid as to the experience of a witness to permit him to testify as to the alcoholic content of liquor drunk by him rests in the discretion of the trial court. U. S. v. Percansky (D. C. Minn. 1923) 298 F. 991, writ of error dismissed Percansky v. U. S. (C. C. A. 1924) 5 F.(2d) 1020.

Witness testifying to familiarity with instruments and distillation method of obtaining alcoholic content of liquid, and that he had studied chemistry and had examined and tested liquids in bottles exhibited, was held properly qualified to testify as to their alcoholic content. Chapman v. U. S. (C. C. A. Ind. 1925) 9 F.(2d) 790.

A witness of 13 years' experience testing liquor for alcoholic content at distillery by use of hydrometer was held qualified to testify to its alcoholic content and fitness for beverage purposes. Terzo v. U. S. (C. C. A. Neb. 1925) 9 F.(2d) 357.

Permitting witnesses to testify that bottles seized in raid contained Scotch and other liquors was held proper, where witnesses appeared qualified to express opinion. Landfield v. U. S. (C. C. A. Cal. 1925) 9 F.(2d) 315.

In prosecution under this section and sections 39 and 46 of this title, enforcement officers were held sufficiently qualified to testify to intoxicating character of liquor and that alcoholic content exceeded one-half of 1 per cent. Golden v. U. S. (C. C. A. Minn. 1925) 4 F.(2d) 846.

Testimony of prohibition agent, who was long familiar with taste of beer and experienced in testing its alcoholic content, that beer purchased and tasted by him contained alcoholic content of over 1½ per cent. by volume, was held admissible and entitled to such weight as jury saw fit to give it. Kennedy v. U. S. (C. C. A. Nev. 1925) 4 F.(2d) 488.

Where no objection was made, government prohibition agents were held qualified to testify that bottles seized contained moonshine whisky. Pane v. U. S. (C. C. A. Neb. 1924) 2 F.(2d) 855.

The testimony of a prohibition agent that in the course of his employment as such he had many times drunk liquor for the purpose of determining its character has been held to qualify him to testify that a particular liquor he drank was moonshine whisky. U. S. v. Golden (D. C. Minn. 1923) 1 F.(2d) 543. See Golden v. U. S. (C. C. A. 1925) 4 F.(2d) 846.

Testimony of an officer that, by reason of experience, it was manifest to him that liquor was being distilled on defendant's premises, due to odor, has been held to be competent and conclusive, where undisputed as to defendant's manufacture of intoxicating liquor. Malacrauis v. U. S. (C. C. A. W. Va. 1924) 299 F. 253.

Objection to questions by defendants' counsel, calling for conclusions of witness, was held properly sustained. Lewis v. U. S. (C. C. A. Mich. 1926) 11 F.(2d) 745.

Rejecting expert testimony discrediting plaintiff's expert and requiring defendant's expert to test liquor and give evidence as to its character was held erroneous. Furlong v. U. S. (C. C. A. Neb. 1926) 10 F.(2d) 492.

That a witness describing rooms in defendant's lodging house, in one of which it was testified that liquor had been purchased and served, called them "serving rooms," was held not ground for striking out the testimony. Scribner v. U. S. (C. C. A. Wash. 1924) 2 F.(2d) 144.

118. —— Documentary evidence.—In liquor prosecution, admission of defendant's affidavit, made on motion to suppress the evidence, to show his ownership of the wine and articles designed to manufacture it, was held not ground for complaint, where defendant did not object to its introduction, and it was a voluntary affidavit, made and filed in the record, thereby being equivalent to any other admission or confession by defendant showing or tending to show his guilt. U. S. v. Lindsly (D. C. La. 1925) 7 F.(2d) 247,

reversed on other grounds Lindsly v. U. S. (C. C. A. 1926) 12 F.(2d) 771.

In prosecution under section 88 of Title 18, Criminal Code and Criminal Procedure, for conspiracy to violate the National Prohibition Act (incorporated in this title), and the Tariff Act of 1922 (chapter 3 of Title 19, Customs Duties), by unlawfully importing liquor, where prima facie showing of conspiracy was made, there was no error in receiving in evidence logs of British vessel seized. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —.

Circumstances held sufficient to constitute prima facie authentication of telegram. Id.

Admission of mutilated $1 bills on which lists of liquor were written held not error. Id.

Admitting in liquor prosecution address label of radical newspaper to establish defendant's connection with place where liquor was sold was held not error as calculating to prejudice jury by showing sympathy with such organization; there being no translation of matter which was printed in foreign language. Maki v. U. S. (C. C. A. Idaho, 1926) 12 F.(2d) 668.

Stolen letters and telegrams found on the person of defendant when he was arrested, on probable cause, in the room of another person, for conspiracy to violate the National Prohibition Act (incorporated in this title), and which were instruments used in carrying out the conspiracy, were held admissible in evidence against him on the charge of conspiracy, and also on the charge of larceny of the letters and telegrams. Donegan v. U. S. (C. C. A. N. Y. 1922) 287 F. 641, certiorari denied (1923) 43 S. Ct. 251, 260 U. S. 751, 67 L. Ed. 495.

In a prosecution for violation of this section, where the government agents procured tags used for making purchases, it was held, that there was no error in the admission of the tags in evidence. Cabiale v. U. S. (C. C. A. Cal. 1921) 276 F. 769.

Where the indictment charged the sending of a telegram as one of the overt acts in furtherance of a conspiracy to transport intoxicating liquor, the telegram, properly identified as having been delivered by one of the defendants to a telegraph company for transmission, was held competent evidence, without proof it was ever received. Alderman v. U. S. (C. C. A. Fla. 1922) 279 F. 259, certiorari denied (1922) 42 S. Ct. 586, 259 U. S. 584, 66 L. Ed. 1075.

Where officers were warranted to enter building and seize beer and instrumentalities used in its making, there was no error in admitting, as admission of defendant, affidavit by him annexed to petition for return of property, wherein he deposed that he was in possession and control of premises described, and that certain persons therein were his employees. Vaught v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 370.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), of many defendants, including lawyers, who apparently had a monopoly of business affecting such matters at place involved, record of city court, judge of which was also defendant, showing manner of handling prosecutions, was held admissible. Allen v. U. S. (C. C. A. Ind. 1925) 4 F.(2d) 688, certiorari denied Hunter v. U. S. (1925) 45 S. Ct. 352, 267 U. S. 597, 69 L. Ed. 806; Mullen v. U. S. (1925) 45 S. Ct. 353, 267 U. S. 598, 69 L. Ed. 806, and Johnson v. U. S. (1925) 45 S. Ct. 509, 268 U. S. 689, 69 L. Ed. 1158.

Custom house records, showing whisky stolen from bonded warehouse was legally imported, was held properly admitted over objection of incompetency, irrelevancy, and immateriality. Gonch v. Republic Storage Co. (1926) 219 N. Y. S. 46, 218 App. Div. 584.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), certified copies of invoices for liquor sold to one defendant by a Canadian corporation, though secondary evidence, were held admissible. Hoxie v. U. S. (C. C. A. Alaska, 1926) 15 F.(2d) 762, certiorari denied (1927) 47 S. Ct. 459, 71 L. Ed. —.

119. —— Admissions, confessions, declarations and hearsay.—That confession was made by accused while under arrest, or that it was elicited by questions of officers, does not necessarily render it involuntary. Gray v. U. S. (C. C. A. Cal. 1926) 9 F.(2d) 337.

In a prosecution for illegal sale of liquor, admission in chief of evidence that prohibition agents had been told that they could buy whisky at defendant's place, which was not only irrelevant, but highly prejudicial, was held error. Kolp v. U. S. (C. C. A. Tenn. 1924) 2 F.(2d) 953.

In prosecution for conspiracy to violate the National Prohibition Act (incorporated in this title), defendant's statement tending to show that he was not connected with saloon was not made competent by testimony for the government that defendant had made a different statement tending to prove that he did have an interest. Chafin v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 592, certiorari denied (1925) 46 S. Ct. 18, 269 U. S. 552, 70 L. Ed. 407.

In liquor prosecution, testimony of taxi driver that defendant, keeping house of ill fame, paid him agreed commission on money expended by customers, including amount expended for liquor, was held not hearsay. Harris v. U. S. (C. C. A. Mich. 1926) 13 F.(2d) 849.

In a prosecution for possession and sale of intoxicating liquor, testimony as

to statement made by third person to witness, in the presence and hearing of the defendant, tending to show defendant's guilt, was held admissible. Ritter v. U. S. (C. C. A. Nev. 1923) 293 F. 187.

The rule which excludes offers of compromise in civil cases does not apply to criminal cases; for, while law encourages settlement of civil suits, compounding of crime is against public policy. Christian v. U. S. (C. C. A. Ala. 1925) 8 F.(2d) 732.

In liquor prosecution, evidence in rebuttal of defendant's defense of alibi, that he offered to plead guilty if he could settle charge against him by paying a fine, was held admissible, though it disclosed an offer of compromise, since it also was evidence of guilt. Id.

In prosecution for unlawful sale and possession of intoxicating liquor, testimony by federal agent as to complaints which had been received by him, and which led to his visit to defendant's premises, was held hearsay improperly admitted. Mattson v. U. S. (C. C. A. Minn. 1925) 7 F.(2d) 427.

In prosecution for violation of National Prohibition Act (incorporated in this title), where, at trial of another for the same offense, accused had testified that liquor was his, testimony of police officer, who was present at former trial, as to testimony there given by accused, was held competent; but testimony as to remarks of judge and counsel, and testimony of the person there on trial, was not competent, though all in presence of accused. Boitano v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 324.

In prosecution for selling liquor and for maintaining a nuisance, testimony of prohibition director, in response to question why he had sent two witnesses to accused's drug store, that he had many complaints of "bootlegging up there in that store," was erroneously admitted, as being irrebuttable hearsay and incompetent evidence. Hermansky v. U. S. (C. C. A. Neb. 1925) 7 F.(2d) 458.

Statements of the accused to officers while she was under arrest and in custody become competent on showing, after they were offered, that they were freely and voluntarily made. Johnstone v. U. S. (C. C. A. Wash. 1924) 1 F.(2d) 928.

Testimony as to conversations had by purchaser of liquor with colored maid, who obtained permission to make sale from defendant was held properly admitted as part of res gestæ in prosecution for unlawful sale, possession, and maintenance of nuisance. Stockman v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 211.

On trial of officers for conspiracy to import and transport liquor, where government proved making of false report of the transaction, evidence of true oral reports was not inadmissible, as self-serving, in view of its bearing on question of intent. Parmenter v. U. S. (C. C. A. Mich. 1924) 2 F.(2d) 945, certiorari denied (1925) 45 S. Ct. 514, 268 U. S. 697, 69 L. Ed. 1163.

120. —— Acts and declarations of coconspirators and co-defendants.—In prosecution for conspiracy to violate the National Prohibition Act (incorporated in this title) testimony given by one of the conspirators of what another conspirator, who had died, had told the witness, during the progress of the conspiracy, was held competent. Delaney v. U. S. (1924) 44 S. Ct. 206, 263 U. S. 586, 68 L. Ed. 462.

On trial of defendants, charged with conspiracy to illegally transport and sell intoxicating liquor, testimony of a sheriff that during the time the conspiracy was alleged to be in existence one of the defendants offered to pay him for permission to transport liquor through his county was held admissible against all defendants. Martin v. U. S. (C. C. A. Fla. 1927) 17 F.(2d) 973.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title) declarations by each and all of defendants admitting conspiracy were held competent, though declaration by one would not be competent or sufficient to prove conspiracy. Cummings v. U. S. (C. C. A. Wash. 1926) 15 F.(2d) 168.

Evidence of admission by conspirator held competent against others as against objection that conspiracy had come to an end. Shown v. U. S. (C. C. A. Idaho, 1926) 12 F.(2d) 594.

Testimony in reference to liquor taken from person of one of defendants was admissible against other defendants, in prosecution for conspiracy to violate National Prohibition Act (incorporated in this title). Keith v. U. S. (C. C. A. Ky. 1926) 11 F.(2d) 933.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title) testimony by members of alleged association, but not indicted, was held properly admitted as coming from coconspirators. Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F.(2d) 505, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. ——.

Evidence of co-operation or concert of action of defendants in possession and control of liquor was held sufficient proof of corpus delicti to warrant admission of evidence of statements made by defendants. Shook v. U. S. (C. C. A. Miss. 1926) 10 F.(2d) 151, certiorari denied (1926) 46 S. Ct. 482, 271 U. S. 666, 70 L. Ed. 1141.

In prosecution of three defendants for violation of National Prohibition Act (incorporated in this title) evidence of conversation had by prohibition agent with one defendant was held admissible; others being entitled, if requested, to instruction limiting its use. Brooks v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 593.

In prosecution of many defendants for

conspiracy to violate National Prohibition Act (incorporated in this title) admission of testimony of newspaper reporter that he had visited soft drink parlors and homes of vice, where intoxicating liquors were openly sold, and testimony as to conversation had at one place with unidentified woman, relative to amount paid by her for protection was held not error, nor violative of substantial rights of parties, under section 391 of Title 28, Judicial Code and Judiciary; there being evidence sufficient to establish a prima facie case showing such woman to be a conspirator, rendering her admission receivable against other conspirators. Allen v. U. S. (C. C. A. Ind. 1925) 4 F.(2d) 688, certiorari denied Hunter v. U. S. (1925) 45 S. Ct. 352, 267 U. S. 597, 69 L. Ed. 806, Mullen v. U. S. (1925) 45 S. Ct. 353, 267 U. S. 598, 69 L. Ed. 806, and Johnson v. U. S. (1925) 45 S. Ct. 509, 268 U. S. 689, 69 L. Ed. 1158.

On the trial of a defendant, charged with another with the possession and sale of liquor in violation of the National Prohibition Act (incorporated in this title) in pursuance of a conspiracy between them, where there was other evidence of the conspiracy, statements made by his codefendant, while making sales of liquor, that defendant was his partner, and of his activities in connection with the business, have been held admissible. Shively v. U. S. (C. C. A. Wash. 1924) 299 F. 710, certiorari denied (1924) 45 S. Ct. 99, 266 U. S. 619, 69 L. Ed. 471.

In a prosecution for conspiracy to violate this section, before the declaration of an alleged coconspirator can be admissible the conspiracy must be shown, and it must also be shown that the defendant, against whom the evidence was offered, was a party to such conspiracy. Pope v. U. S. (C. C. A. Pa. 1923) 289 F. 312, certiorari denied (1923) 44 S. Ct. 33, 263 U. S. 703, 68 L. Ed. 515.

Where an indictment charged a general conspiracy to bring liquor into Alaska from foreign waters by means of boats, the fact that a boat operated by defendants, after loading with liquor in Canadian waters, was seized with the cargo by Canadian authorities for violation of the navigation laws, did not require the court to hold as matter of law that the conspiracy was ended, so as to render declarations made by one of the alleged conspirators to the Canadian officers inadmissible against the others. Simpson v. U. S. (C. C. A. Alaska, 1923) 289 F. 188, certiorari denied (1923) 44 S. Ct. 35, 263 U. S. 707, 68 L. Ed. 517.

121. Weight and sufficiency in general.—A plea of guilty in the state court to a charge of transporting intoxicating liquor in the state is an extrajudicial confession, admissible on a trial in the federal court for transporting intoxicating liquor from a point out of the state into the state, but not sufficient to sustain a conviction, without corroborating evidence of the corpus delicti. Proof that a large quantity of intoxicating liquor was found in defendant's residence is not proof of the corpus delicti of transporting liquor from a point outside the state into the state, so it is not sufficient to corroborate extrajudicial confessions. Martin v. U. S. (C. C. A. Neb. 1920) 264 F. 950.

In liquor prosecution, ex parte affidavit of witness, contradicting testimony given by him in open court, when he was subjected to cross-examination, could not be treated as worthy of belief. U. S. v. Lindsly (D. C. La. 1923) 7 F.(2d) 247, reversed on other grounds, Lindsly v. U. S. (C. C. A. 1926) 12 F.(2d) 771.

Ex parte affidavits, prepared by some one else for signature of witness, have not the same evidentiary value as the sworn testimony in open court of the same witness, supported by his written report signed by him, which he then verified as truthful. Id.

Defendant's guilt may be inferred from the finding of liquor in an unusual place of concealment on his premises, though the only direct testimony was to the effect that he had no knowledge of it. Parks v. U. S. (C. C. A. S. C. 1924) 297 F. 834.

Evidence of conspiracy to violate the Volstead Act (incorporated in this title) held sufficient. Betz v. U. S. (C. C. A. Ky. 1924) 2 F.(2d) 552.

A charge of unlawfully transporting liquor was held not supported by testimony of the arresting officer that defendant said he was going to load the liquor on a truck, but that it remained in defendant's house until loaded and transported on order of the officer. U. S. v. Bonner (D. C. Pa. 1923) 285 F. 393.

Evidence that intoxicating liquors were brought into premises rented by defendant under a fictitious name, and also into his garage was held sufficient to support a count, under National Prohibition Act (incorporated in this title) and regulations thereunder for possession of intoxicating liquors. Anderson v. U. S. (C. C. A. N. Y. 1923) 294 F. 593.

An indictment for sale for beverage purposes of intoxicating liquor was held supported by testimony of witnesses, who stated that they were experienced in the use of whisky and that the beverage they ordered and received and drank was whisky. Heitler v. U. S. (C. C. A. Ill. 1922) 280 F. 703.

122. —— Sufficiency to show particular facts.—In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), bank cashier's testimony held sufficient to show that particular drafts payable to one alleged conspirator were sold and delivered by the

bank to another. Hoxie v. U. S. (C. C. A. Alaska, 1926) 15 F.(2d) 762, certiorari denied (1927) 47 S. Ct. 459, 71 L. Ed. —.

In prosecution for aiding, inducing, and procuring another to sell intoxicating liquor, in violation of this section, evidence held to warrant finding that alcohol was sold for beverage purposes, and was fit for such purposes, and accused's motion for directed verdict at close of evidence held properly denied. Foley v. U. S. (C. C. A. Me. 1927) 17 F.(2d) 88.

Evidence held insufficient to show that one of defendants had entered into conspiracy to sell, barter, transport, deliver, furnish, possess, and manufacture intoxicating liquor. La Rosa v. U. S. (C. C. A. W. Va. 1926) 15 F.(2d) 479.

In prosecution for conspiracy, evidence held to justify inference that intoxicating liquor, lawfully purchased, was kept and used in violation of prohibition law. Keith v. U. S. (C. C. A. Ky. 1926) 11 F. (2d) 933.

Evidence held to show sale of "home brew." Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260.

Evidence held sufficient to show existence of conspiracy to import and possess liquor, and to prove overt acts alleged, at least one of which took place in the Northern district of California. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —.

Evidence held to warrant finding that accused unlawfully possessed liquor found in his dwelling for commercial purposes, and that liquor was recently acquired. Horowitz v. U. S. (C. C. A. R. I. 1926) 10 F.(2d) 286.

Evidence held to warrant finding that accused unlawfully possessed liquor found in his garage. Id.

Proof held not to establish that liquors were brought into country. Romano v. U. S. (C. C. A. N. Y. 1925) 9 F. (2d) 522.

In liquor prosecution, defendant's ownership of the wine and articles designed to manufacture it could be inferred from his affidavit on motion to suppress the evidence, wherein he claimed the house and premises where wine and articles were found. U. S. v. Lindsly (D. C. La. 1925) 7 F.(2d) 247, reversed on another ground Lindsly v. U. S. (C. C. A. 1926) 12 F.(2d) 771.

In prosecution of druggist for possession of liquor in violation of Volstead Act (incorporated in this title), and holding liquors for sale contrary to regulations and his permit, a single sale may be enough to show that it was an instance of habitual practice, sufficient to justify finding that whole stock is held for illicit sale. Steckler v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 59.

Evidence that defendant operated pool hall in which his brother sold whisky, and after one sale turned money over to defendant, who rang up amount in cash register, held sufficient to connect defendant with unlawful sales. Pane v. U. S. (C. C. A. Neb. 1924) 2 F.(2d) 855.

Evidence held insufficient to establish an unlawful entrapment. Murphy v. U. S. (C. C. A. Ga. 1924) 2 F.(2d) 599.

In a prosecution for violating the National Prohibition Act (incorporated in this title) evidence held insufficient to show unlawful transportation of liquor. Huth v. U. S. (C. C. A. Ky. 1924) 295 F. 35.

In a prosecution for conspiracy to violate and for violating the National Prohibition Act (incorporated in this title) evidence held insufficient to warrant a finding that defendants conspired to have a truckman engage in unlawful possession or transportation of the liquor. Id.

In a prosecution for violating the National Prohibition Act (incorporated in this title), evidence held insufficient to show unlawful possession or transportation of liquor. Id.

Evidence held to warrant finding that liquor sold by alleged conspirator was transported into and through district. Costal v. U. S. (C. C. A. Ohio, 1926) 13 F.(2d) 843.

123. —— **Sufficiency to support conviction.**—A conviction of violating this section cannot be sustained on merely a strong suspicion of guilt. De Villa v. U. S. (C. C. A. Neb. 1923) 294 F. 535.

Evidence held to sustain conviction for unlawful importation, possession, and transportation of intoxicating liquor. Roberts v. U. S. (C. C. A. Tex. 1926) 11 F. (2d) 606. For unlawful manufacture and possession of intoxicating liquor. Palazini v. U. S. (C. C. A. R. I. 1926) 14 F. (2d) 886; Webb v. U. S. (C. C. A. Okl. 1925) 8 F.(2d) 145. For unlawful possession and unlawful sale of intoxicating liquors. Friedman v. U. S. (C. C. A. Mich. 1926) 13 F.(2d) 632; Golden v. U. S. (C. C. A. Minn. 1925) 4 F.(2d) 846. For possessing and selling whisky. Meyers v. U. S. (C. C. A. N. Y. 1924) 3 F.(2d) 379. For unlawful possession and transportation of intoxicating liquor. Buchanan v. U. S. (C. C. A. Okl. 1926) 15 F.(2d) 496; Gay v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 219.

Evidence held to sustain a conviction under counts alleging a conspiracy to import, possession, transportation, and sale of intoxicating liquor. Falconer v. U. S. (C. C. A. Wash. 1923) 294 F. 86, certiorari denied (1924) 44 S. Ct. 453, 264 U. S. 593, 68 L. Ed. 866.

Evidence that defendant made a sale of liquor for beverage purposes on his premises, and that he had a quantity thereon, held sufficient to sustain a conviction on three counts charging respectively unlawful sale, unlawful possession, and main-

taining a "common nuisance." Fassolla v. U. S. (C. C. A. Cal. 1922) 285 F. 378.

Evidence held sufficient to sustain conviction of particular defendants for sale and possession of whisky on particular dates covered by different counts of indictment, and insufficient to sustain conviction as to other dates covered by different counts of indictment. Kennedy v. U. S. (C. C. A. Nev. 1925) 4 F.(2d) 488.

In a prosecution for maintaining a nuisance and for unlawful possession of intoxicating liquor, under the National Prohibition Act (incorporated in this title), evidence held to make question of guilt question for jury and to sustain a verdict of guilty. Traversi v. U. S. (C. C. A. Cal. 1923) 288 F. 375.

Evidence held insufficient to sustain conviction of illegal possession and manufacture of intoxicating liquor. Harlivy v. U. S. (C. C. A. Okl. 1926) 13 F.(2d) 114.

In prosecution of husband and wife for violation of the National Prohibition Act (incorporated in this title), by maintaining a common nuisance and unlawful possession of intoxicating liquor, evidence held insufficient to sustain conviction of wife. Gazzera v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 467.

Evidence that two defendants were riding in an automobile in which intoxicating liquor was being transported, and when the car was wrecked the driver attempted to escape, has been held insufficient to support a conviction of conspiracy to transport liquor in violation of this Act, and sufficient only as to the driver to support a conviction for unlawful transportation. Stafford v. U. S. (C. C. A. Ky. 1924) 300 F. 537.

Evidence held insufficient to sustain conviction for aiding and abetting unlawful transportation and possession of intoxicating liquors. Pontiff v. U. S. (C. C. A. Mass. 1925) 9 F.(2d) 29.

Testimony of Accomplice

Conviction may be had for violations of Prohibition Act (incorporated in this title), on evidence of an accomplice, if believed by jury. Roberts v. U. S. (C. C. A. Tex. 1926) 11 F.(2d) 606.

Convictions on testimony of accomplice will not be invalidated, where jury was properly instructed. Knable v. U. S. (C. C. A. Ohio, 1925) 9 F.(2d) 567.

The purchaser is not an accomplice in an unlawful sale of intoxicating liquor. De Long v. U. S. (C. C. A. Neb. 1923) 4 F. (2d) 244.

Even though prohibition officers to whom defendants sold liquor were coconspirators, corroboration of their testimony was not necessary to warrant conviction. Ahearn v. U. S. (C. C. A. Cal. 1925) 3 F.(2d) 808, certiorari denied (1925) 45 S. Ct. 511, 268 U. S. 692, 69 L. Ed. 1160.

Manufacture

Evidence held to sustain conviction for unlawful manufacture of intoxicating liquor. Gracie v. U. S. (C. C. A. R. I. 1926) 15 F.(2d) 644, certiorari denied (1927) 47 S. Ct. 449, 71 L. Ed. —; Rouda v. U. S. (C. C. A. N. Y. 1926) 10 F.(2d) 916; Felton v. U. S. (C. C. A. Ky. 1925) 8 F.(2d) 990.

Evidence showing manufacture of fruit juice beverage having more than one-half of 1 per cent. of alcohol held insufficient to sustain conviction for manufacturing intoxicating liquor. Isner v. U. S. (C. C. A. W. Va. 1925) 8 F.(2d) 487.

Possession

Evidence held to sustain conviction for unlawful possession of intoxicating liquor. Felton v. U. S. (C. C. A. Ky. 1925) 8 F.(2d) 990; Gay v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 219; Broens v. U. S. (C. C. A. Tenn. 1923) 290 F. 809; Maes v. U. S. (C. C. A. S. C. 1923) 287 F. 137; Rose v. U. S. (C. C. A. Ohio, 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed. 419.

In prosecution for unlawful possession of intoxicating liquor, in violation of National Prohibition Act (incorporated in this title), testimony of accused on trial of another as to ownership of liquor held sufficient to sustain conviction. Boitano v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 324.

Evidence held to warrant conviction for possession of manager of tavern, but insufficient as to employé. Landfield v. U. S. (C. C. A. Cal. 1925) 9 F.(2d) 315.

In a prosecution for unlawful possession of intoxicating liquor at a club, evidence that one of the defendants was a member and officer of the club and that he occasionally tended the bar, though that was generally done by others, and that he was present on the night of the raid, held sufficient to warrant conviction. Page v. U. S. (C. C. A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S. Ct. 461, 258 U. S. 627, 66 L. Ed. 799.

Evidence that defendant kept and sold for beverage purposes fruit extracts, which were intoxicating, held sufficient to sustain a conviction of possessing intoxicating liquors, in violation of the National Prohibition Act (incorporated in this title). Maes v. U. S. (C. C. A. S. C. 1923) 287 F. 137.

Evidence that defendant made a sale of liquor for beverage purposes on his premises and that he had a quantity thereon held sufficient to sustain a conviction on count charging unlawful possession. Fassolla v. U. S. (C. C. A. Cal. 1922) 285 F. 378.

Evidence held sufficient, in view of section 50 of this title, to sustain conviction for possession of liquor in violation of this section. Id.

Evidence held insufficient to sustain conviction for unlawful possession. Gatt v. U. S. (C. C. A. Wash. 1925) 9 F.(2d) 388; Siden v. U. S. (C. C. A. Minn. 1925) 9 F.(2d) 241, modified on rehearing (C. C. A. 1926) 14 F.(2d) 846.

Testimony that officers drained dregs from empty or castaway bottles found on defendant's premises, and thereby obtained an ounce of whisky, held insufficient to sustain conviction, under National Prohibition Act (incorporated in this title), for unlawful possession. Chorak v. U. S. (C. C. A. Wash. 1926) 15 F. (2d) 945.

Sale

Evidence held sufficient to support conviction for selling liquor in violation of the National Prohibition Act (incorporated in this title). Henry v. U. S. (C. C. A. Idaho, 1926) 12 F.(2d) 670.

Evidence on trial of bartender for selling liquor held sufficient to support a conviction. Ferry v. U. S. (C. C. A. Pa. 1923) 292 F. 583.

Evidence held sufficient to warrant conviction for sale of whisky. Gray v. U. S. (C. C. A. Mo. 1926) 14 F.(2d) 366.

Evidence held to sustain a conviction for unlawful sale of beer and wine. Sabutis v. U. S. (C. C. A. Ill. 1921) 270 F. 209.

Evidence that defendant made a sale of liquor for beverage purposes on his premises and that he had a quantity thereon held sufficient to sustain a conviction on count charging unlawful sale. Fassolla v. U. S. (C. C. A. Cal. 1922) 285 F. 378.

Evidence of sales of liquor by waiter in café owned in part and conducted by defendant held sufficient to sustain conviction for unlawful sale, under this section in view of section 550 of Title 18, Criminal Code and Criminal Procedure, and Organic section 734 of Title 48, Territories and Insular Possessions. Melendez v. U. S. (C. C. A. Porto Rico, 1926) 15 F.(2d) 770.

In prosecution for sale of liquor in violation of National Prohibition Act (incorporated in this title), evidence that the parties had fully agreed on all the terms of the sale, the quantity of liquor to be sold, the purchase price, and the time and place of delivery, and that the liquor was in fact delivered, and that nothing remained to be done but the payment of the purchase price, was held sufficient to sustain conviction. Ahearn v. U. S. (C. C. A. Cal. 1925) 3 F.(2d) 808, certiorari denied (1925) 45 S. Ct. 511, 268 U. S. 692, 69 L. Ed. 1160.

Evidence failing to show a delivery of liquor which one defendant had been sent for, or an intention that title thereto should pass before actual delivery, held insufficient to sustain conviction for sale. Filiatreau v. U. S. (C. C. A. Ky. 1926) 14 F.(2d) 659.

In Berry v. U. S. (C. C. A. Ill. 1921) 275 F. 680, it appeared that the plaintiffs in error were convicted of selling beer in violation of the Volstead Act (incorporated in this title). Government agents purchased two bottles containing some sort of liquid and drank the contents. They were permitted, over objection, to say that what they drank was beer. In holding that such evidence was insufficient to justify a conviction, the court said: "To constitute a violation, the drink would have had to be 'beer' as defined in the act. These government agents were not chemists, attempted no analysis, and established no expert qualifications to measure the alcoholic content of the liquid by drinking it. Their testimony that the liquid was the 'beer' denounced by the act was therefore merely the opinion of unqualified witnesses, and affords no basis for the judgment."

Evidence held to sustain conviction of druggist for unlawful sale of intoxicating liquor. Woods v. U. S. (C. C. A. Wash. 1923) 290 F. 957.

Transportation

Conviction of the conductor of a railroad train as aider and abetter in the illegal transportation of liquor was held sustained by evidence that a number of cans containing whisky, in all 55 gallons, were being carried on his train, and that the cans could readily be seen and the whisky from leakage smelled. Powell v. U. S. (C. C. A. N. C. 1924) 2 F.(2d) 47.

Conspiracy

Evidence held to sustain conviction for conspiracy to illegally import, transport, and sell liquor. Martin v. U. S. (C. C. A. Fla. 1927) 17 F.(2d) 973.

Evidence held to sustain conviction only as to particular defendants of conspiracy to violate National Prohibition Act (incorporated in this title). Lucking v. U. S. (C. C. A. Ind. 1926) 14 F.(2d) 881.

Evidence held to sustain conviction, under section 88 of Title 18, Criminal Code and Criminal Procedure, for conspiracy to import liquor, in violation of National Prohibition Act (incorporated in this title). Campanelli v. U. S. (C. C. A. Alaska, 1926) 13 F.(2d) 750.

Evidence held to sustain conviction of member of brewery partnership of conspiracy to violate the National Prohibition Act (incorporated in this title). Ross v. U. S. (C. C. A. Mich. 1926) 13 F.(2d) 604, certiorari denied (1926) 47 S. Ct. 243, 71 L. Ed. ——.

Evidence held to sustain conviction of numerous defendants of conspiracy to violate National Prohibition Act, tit. 2 (incorporated in this title), but not to support conviction of common laborers in

brewery ostensibly making near beer. Jezewski v. U. S. (C. C. A. Mich. 1926) 13 F.(2d) 599, certiorari denied Ross v. U. S. (1926) 47 S. Ct. 243, 71 L. Ed. —.

Evidence held to warrant conviction of certain defendants of conspiracy to violate National Prohibition Act (incorporated in this title) by transporting intoxicating liquor from Canada. Lewis v. U. S. (C. C. A. Mich. 1926) 11 F.(2d) 745.

Evidence held to sustain conviction for conspiracy to possess and transport intoxicating liquor, in violation of National Prohibition Act (incorporated in this title). Simpson v. U. S. (C. C. A. W. Va. 1926) 11 F.(2d) 591, certiorari denied (1926) 46 S. Ct. 488, 271 U. S. 674, 70 L. Ed. 1145.

Evidence held sufficient to sustain conviction for conspiracy to violate National Prohibition Act (incorporated in this title). Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339 certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —; Belvin v. U. S. (C. C. A. Va. 1926) 12 F. (2d) 548, certiorari denied (1926) 47 S. Ct. 98, 71 L. Ed. —; Langley v. U. S. (C. C. A. Ky. 1925) 8 F.(2d) 815, certiorari denied (1926) 46 S. Ct. 204, 269 U. S. 588, 70 L. Ed. 427.

Evidence held to warrant conviction for conspiracy to possess and sell liquor in former Indian country. Billingsley v. U. S. (C. C. A. Okl. 1926) 16 F.(2d) 754.

Where one of two defendants, convicted for conspiracy to violate National Prohibition Act (incorporated in this title), admitted ownership of all liquor found and seized on premises searched under void search warrant, and where the other lived on premises so searched, and some of the things admitted in evidence were taken from his possession, held, conviction could not be sustained. Pielow v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 492.

Evidence held to sustain conviction of certain defendants of conspiracy to violate the National Prohibition Act (incorporated in this title) by possessing, importing, and selling intoxicating liquors, fraudulently withdrawn from bonded warehouse. Becher v. U. S. (C. C. A. N. Y. 1924) 5 F.(2d) 45, certiorari denied (1925) 45 S. Ct. 462, 267 U. S. 602, 69 L. Ed. 808.

Evidence held to sustain conviction for conspiracy to violate this section by unlawfully agreeing to possess, sell, transport, store, and deal in intoxicating liquor. Williams v. U. S. (C. C. A. Tenn. 1925) 3 F.(2d) 933.

Conviction for conspiracy to unlawfully possess intoxicating liquor in violation of National Prohibition Act, tit. 2 (incorporated in this title) was sustained by proof of an agreement to transport the liquor, since such proof included proof of an agreement to possess. Powers v. U. S. (C. C. A. Tex. 1923) 294 F. 512.

In a prosecution under section 88 of Title 18, Criminal Code and Criminal Procedure for conspiring to unlawfully import intoxicating liquors to the United States for beverage purposes, in violation of National Prohibition Act (incorporated in this title) evidence held sufficient to sustain a conviction and to warrant the court's refusal to direct a verdict of acquittal. Schliefer v. U. S. (C. C. A. N. J. 1923) 288 F. 368, certiorari denied (1923) 43 S. Ct. 703, 262 U. S. 756, 67 L. Ed. 1218.

Where defendant pleaded guilty to counts of the indictment alleging violations of the National Prohibition Act (incorporated in this title), which were named as overt acts in a count charging conspiracy, and there was also evidence of a joint transportation by him and another, named as co-conspirator, under circumstances clearly showing they were acting together, the evidence was sufficient to sustain conviction for conspiracy. Windsor v. U. S. (C. C. A. Ohio, 1923) 286 F. 51, certiorari denied (1923) 43 S. Ct. 523, 262 U. S. 748, 67 L. Ed. 1212.

Evidence held insufficient to sustain conviction for conspiracy to violate the Volstead Act (incorporated in this title). Turinetti v. U. S. (C. C. A. Neb. 1924) 2 F.(2d) 15.

TRIAL

141. Joint or separate trials.—Compelling defendants separately indicted to go to common trial held unauthorized by section 557 of Title 18, Criminal Code and Criminal Procedure or section 734 of Title 28, Judicial Code and Judiciary. Zedd v. U. S. (C. C. A. Va. 1926) 11 F.(2d) 96.

142. Proceedings at trial in general.—Government had right to use testimony of witnesses, who had confessed to crime for which defendant was being tried, and thereafter voluntarily went on stand to testify against defendant. Shields v. U. S. (C. C. A. Pa. 1927) 17 F.(2d) 66, reversed on other grounds (1927) 47 S. Ct. 478, 71 L. Ed. —.

Trial court's ruling as matter of law that testimony before grand jury was material with respect to violation of prohibition law held not erroneous. Carroll v. U. S. (C. C. A. N. Y. 1927) 16 F.(2d) 951, certiorari denied (1927) 47 S. Ct. 477, 71 L. Ed. —.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title) court's repeated and emphatic statement that he gave no credence to particular testimony for defendant held reversible error. Cook v. U. S. (C. C. A. Okl. 1926) 14 F.(2d) 833.

Refusal to withdraw evidence affecting a defendant as to whom verdict was directed held not reversible error. Horowitz v. U. S. (C. C. A. Fla. 1926) 12 F. (2d) 590, certiorari denied (1926) 47 S. Ct. 93, 71 L. Ed. —.

After both parties had rested, and defendants had moved for a directed verdict in their favor, on the ground that the liq-

nor in question had not been introduced in evidence, it was within the discretion of the trial court to permit the government to reopen the case for additional testimony. McGrew v. U. S. (C. C. A. Mont. 1922) 281 F. 809.

Granting government's motion to reopen case for further testimony after it had rested was held not error. Mansbach v. U. S. (C. C. A. N. J. 1926) 11 F.(2d) 221.

Right to call a witness in rebuttal is in discretion of trial court. Assaid v. U. S. (C. C. A. Va. 1926) 10 F.(2d) 752.

It is function of the court to determine what evidence is admissible. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, certiorari granted (1926) 46 S. Ct. 475, 271 U. S. 652, 70 L. Ed. 1133, and affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —.

Court must determine facts necessary to be determined in passing on objections to testimony. Id.

Court's remark, in passing on testimony, that there had been perjury, was held without prejudice to defendants. Id.

Defendant eliciting damaging collateral matter on cross-examination and attempting to contradict same cannot object to rebuttal testimony on same issue. Gray v. U. S. (C. C. A. Cal. 1926) 9 F.(2d) 337.

In liquor prosecution, admission of defendant's affidavit, made on motion to suppress the evidence to show his ownership of the wine and articles designed to manufacture it, was held not ground for complaint, where defendant did not object to its introduction. U. S. v. Lindsly (D. C. La. 1925) 7 F.(2d) 247, reversed on another ground, Lindsly v. U. S. (C. C. A. 1926) 12 F.(2d) 771.

Where defendant, charged with illegal sale of liquor in his restaurant, testified that he kept no liquors and had no knowledge of their sale at the time, but afterward learned that a waiter obtained them elsewhere, and supplied them to customers, the testimony of the prohibition agent, who bought the liquor on which the charge was based, that he asked defendant in person for liquor, and it was sold to him, was held admissible in rebuttal. Kelleher v. U. S. (C. C. A. Mass. 1925) 4 F.(2d) 388.

In prosecutions for violation of this Act, permitting the jury to smell or taste a liquid offered in evidence has been declared not to be a proper practice. The court said: "Accepting, but neither approving nor disapproving, the rulings in the cases last cited, as a proper practice at the time and under the conditions prevailing when those cases arose, nevertheless, it is our opinion that when a court comes to deal with the present-day mongrel of nondescript mixtures, that practice ought not to be indulged, because not likely to be helpful but probably prejudicial, and because the practice, as it seems to us, is not in keeping with an orderly and dignified administration of justice." Gallaghan v. U. S. (C. C. A. Neb. 1924) 299 F. 172.

Prosecutions under this Act must be by trial by jury, as the constitutional requirement of trial by jury in a prosecution for crime is mandatory and cannot be waived. Coates v. U. S. (C. C. A. W. Va. 1923) 290 F. 134.

In a prosecution for unlawful possession and transportation of intoxicating liquors, it is not error for the court to refuse to permit the wife of the defendant to be a witness, either for or against him. Lowe v. U. S. (C. C. A. Or. 1922) 282 F. 597. To same effect, see Krashowitz v. U. S. (C. C. A. W. Va. 1922) 282 F. 599.

143. Qualifications of jurors.—That some of jurors in liquor prosecution had participated in previous trial of accused's employee on similar charge was held not to deprive accused of impartial jury. Ramos v. U. S. (C. C. A. Porto Rico, 1926) 12 F.(2d) 761.

Persons contributing to Anti-Saloon League were held not disqualified as jurors in prosecution for conspiring to violate National Prohibition Act (incorporated in this title) where each of them stated that he could and would give as fair consideration to such a case as to any other. Ungerleider v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 604, certiorari denied (1925) 46 S. Ct. 101, 269 U. S. 574, 70 L. Ed. 419.

Jurors were competent to sit in a liquor case, though they had sat in other liquor cases against other persons, in which the same government agents were witnesses, and had formed a certain opinion as to their credibility; they on their voir dire stating that they could try the case fairly. Haussener v. U. S. (C. C. A. Neb. 1925) 4 F.(2d) 884.

144. Statements and argument of counsel.—Defendant held not entitled to complain of alleged improper statement to jury in opening statement, where no exception was taken at time. Langley v. U. S. (C. C. A. Ky. 1925) 8 F.(2d) 815, certiorari denied (1926) 46 S. Ct. 204, 269 U. S. 588, 70 L. Ed. 427.

Defendant's counsel should not have made opening statement, if he did not expect to introduce evidence to substantiate it. Lewis v. U. S. (C. C. A. Mich. 1926) 11 F.(2d) 745.

Opening remarks of prosecuting attorney, in prosecution for conspiracy to violate National Prohibition Act (incorporated in this title) though unsupported by evidence, were held not prejudicial, in view of court's statement. Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F.(2d) 505, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. —.

In a prosecution for violating the National Prohibition Act (incorporated in this title) that the district attorney in his argument stated that, if defendant "is not a bootlegger, there would be some evi-

dence before you here to show it," was held not subject to objection, as referring to defendant's failure to testify. Schwartz v. U. S. (C. C. A. Tex. 1923) 294 F. 528.

Error in prejudicial argument of counsel, "If it is not his [defendant's] whisky, why hasn't he explained it," was held cured by instructions to disregard. Gay v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 219.

145. Examination and impeachment of witnesses.—Cross-examination of defendant as to matter not covered by his examination in chief was held not to require reversal, where his connection with conspiracy charged was directly and positively proved. Apt v. U. S. (C. C. A. Mo. 1926) 13 F.(2d) 126.

Admission in evidence of incriminating statement by one defendant, without first permitting cross-examination of witness through whom it was offered, was held not error. Lewis v. U. S. (C. C. A. Mich. 1926) 11 F.(2d) 745.

Where government's witness stated that he did not make certain statement, objection to question intended to discredit him was held properly sustained. Id.

Trial court was held not subject to criticism in questioning witness in liquor prosecution. Id.

Trial court's examination of one of crew of vessel as to contents of boxes in cargo was held not error, where certain defendants denied knowledge that vessel carried intoxicating liquor. Id.

Refusal to permit cross-examination of government witnesses as to unfriendly feelings toward defendant was held erroneous. Furlong v. U. S. (C. C. A. Neb. 1926) 10 F.(2d) 492.

Cross-examination of witness as to possession of still and arrest therefor was held not within scope of direct examination wherein he testified that accused was working for him some distance from place where sales of liquor were alleged to have been made and not proper attack on credibility of witness. Terzo v. U. S. (C. C. A. Neb. 1925) 9 F.(2d) 357.

In prosecution for violation of National Prohibition Act (incorporated in this title), evidence on cross-examination that defendant had been convicted of misdemeanor for violating state liquor law 13 years previously was held admissible as affecting his credibility as a witness. Merrill v. U. S. (C. C. A. Or. 1925) 6 F.(2d) 120.

A first violation of the National Prohibition Act (incorporated in this title), being neither a felony nor an infamous crime, cross-examination of a defendant touching his prior conviction of such offense is not permissible to impeach his credibility. Haussener v. U. S. (C. C. A. Neb. 1925) 4 F.(2d) 884.

In prosecution for liquor law violations, where principal defense was that of entrapment, refusal to permit defendants to cross-examine attorney as to whether he had discussed with prosecuting witnesses what their testimony would be, particularly concerning subject of entrapment was held error. Lewis v. U. S. (C. C. A. Fla. 1925) 4 F.(2d) 520.

In prosecution for violation of the National Prohibition Act (incorporated in this title), defendant's testimony, on cross-examination, that he had been convicted of violation of the act and had served a term in jail, in response to question whether he had ever "had any connection with the liquor business," was held not ground for reversal, in absence of motion to have answer stricken. Feigin v. U. S. (C. C. A. Cal. 1925) 3 F.(2d) 866.

Where a witness has testified for the prosecution, his fair and full cross-examination on the subjects of his examination in chief is an absolute right of the defendant, and a denial of that right is prejudicial error. So the testimony of a witness, who is familiar with the taste and smell of alcoholic liquors, that a liquid he drank was whisky, is competent, though its weight is for the jury, and the right to cross-examine him may not be denied. And where a witness for the prosecution testified that he made a test of a liquid with a hydrometer and that it contained a certain percentage of alcohol, the denial of the right to show by his cross-examination that other liquids besides alcohol would give the same result, when given a gravity test, was error. Gallaghan v. U. S. (C. C. A. Neb. 1924) 299 F. 172.

Cross-examination of character witness as to whether he had ever heard of defendants being arrested for violation of National Prohibition Act (incorporated in this title), was held not error but cross-examination of such witness, as to whether he had heard defendant had been arrested frequently for violations of such Act, was held erroneous, as placing before jury matter which government would not be permitted to prove. Filippelli v. U. S. (C. C. A. Cal. 1925) 6 F.(2d) 121.

146. Questions for jury.—Testimony must be considered in aspect most favorable to government on motion to direct verdict. Knable v. U. S. (C. C. A. Ohio, 1925) 9 F.(2d) 567.

Credibility of witnesses is question for jury. Marin v. U. S. (C. C. A. Mich. 1926) 10 F.(2d) 271; Fisher v. U. S. (C. C. A. R. I. 1925) 8 F.(2d) 978, certiorari denied (1926) 46 S. Ct. 482, 271 U. S. 666, 70 L. Ed. 1140.

Whether a conspiracy had ended before the making of statements by one of the alleged conspirators, offered in evidence in a prosecution for conspiracy to violate the prohibition against importation of intoxicating liquors into the United States, if doubtful, is a question for the jury.

Simpson v. U. S. (C. C. A. Alaska, 1923) 289 F. 188, certiorari denied (1923) 44 S. Ct. 35, 263 U. S. 707, 68 L. Ed. 517.

Refusal to direct verdict on ground defendant had been unlawfully entrapped and induced to sell intoxicating liquor to officers was held not error, where indictment also charged unlawful possession, as to which there was no defense of entrapment, and where sentence was warranted under such count. Murphy v. U. S. (C. C. A. Ga. 1924) 2 F.(2d) 599.

In prosecution for conspiring to fraudulently import and bring intoxicating liquor into the United States in violation of sections 493, 496, and 497 of Title 19, Customs Duties, and this section, question of defendant's guilt was held for the jury. Lee v. U. S. (C. C. A. Mass. 1926) 14 F.(2d) 400, certiorari denied U. S. v. Lee (1927) 47 S. Ct. 336, 71 L. Ed. ——.

In prosecution under section 88 of Title 18, Criminal Code and Criminal Procedure, for conspiracy to violate this section and section 46 of this title, and section 497 of Title 19, Customs Duties, refusal to submit to jury question of validity of seizure of liquor-laden boat 5.7 miles from United States territory was held not error; such issue, so far as it affected the admissibility of evidence, having been determined by the court. Ford v. U. S. (Cal. 1927) 47 S. Ct. 531, 71 L. Ed. ——.

In a prosecution for manufacturing intoxicating liquors, consisting of a mixture of alcohol, coloring and flavoring extracts, whether such liquor was manufactured before or after the 16th of January, 1920, when the Volstead Act (incorporated in this title), became effective, was held for the jury. U. S. v. Schwartz (C. C. A. N. J. 1921) 276 F. 397.

Whether defendant possessed whisky found in a room in which defendant claimed he no longer lived held for the jury. Waddell v. U. S. (C. C. A. Ark. 1922) 283 F. 409.

In prosecution for unlawfully possessing liquors, evidence was held to show that motion for directed verdict in favor of one defendant should have been granted. Chicco v. U. S. (C. C. A. S. C. 1922) 284 F. 434.

Defense of entrapment was held to present an issue for the jury in Silk v. U. S. (C. C. A. Neb. 1926) 16 F.(2d) 568, opinion modified on petition for rehearing (C. C. A. 1927) 19 F.(2d) 73.

Whether fermented fruit juice was sold and fit for beverage purposes held for jury. Leonard v. U. S. (C. C. A. Tenn. 1927) 18 F.(2d) 208.

147. —— Sufficiency of evidence to make jury question.—In prosecution for possession and sale of liquor in violation of National Prohibition Act (incorporated in this title), testimony of state's witness that he was barkeeper for defendants, and sold liquor with their knowledge, held sufficient to go to jury, though contradicted by defendants. Frisch v. U. S. (C. C. A. N. J. 1927) 17 F.(2d) 81.

Evidence that alcohol was clandestinely obtained from schooner anchored in "Rum Row" held to make its fitness for beverage purposes a jury question. Brown v. U. S. (C. C. A. Mass. 1926) 16 F.(2d) 682.

Evidence in prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), held for jury. Di Bonaventura v. U. S. (C. C. A. W. Va. 1926) 15 F.(2d) 494; Holbert v. U. S. (C. C. A. Tenn. 1926) 13 F.(2d) 392; Shown v. U. S. (C. C. A. Idaho, 1926) 12 F.(2d) 594; Marron v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 251; Baron v. U. S. (C. C. A. Ohio, 1923) 286 F. 822, certiorari denied (1923) 43 S. Ct. 524, 262 U. S. 749, 67 L. Ed. 1213.

Conflicting evidence whether drug store clerk admitted to officers making illegal search that he sold pint of whisky presented question for jury as to unlawful sale. Brock v. U. S. (C. C. A. Mo. 1926) 12 F.(2d) 370; Johnson v. U. S. (C. C. A. Mo. 1926) 12 F.(2d) 374.

Evidence held sufficient to go to jury in prosecution for unlawful possession of intoxicating liquor. Stockman v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 211; Scheck v. U. S. (C. C. A. N. J. 1925) 6 F.(2d) 187.

Evidence of what occurred at time of arrest of defendant and others held sufficient for jury, in trial for conspiracy to violate National Prohibition Law (incorporated in this title). Crowley v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 118.

In prosecution for manufacturing intoxicating liquors, evidence held to make defendant's guilt a question for jury. De Gregorio v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 295.

Evidence on trial for conspiracy held sufficient to raise issue whether accused were interested in manufacture and transportation, in violation of National Prohibition Act, tit. 2 (incorporated in this title), of beer found on premises leased by them and in truck load of beer seized by revenue agents. Kasuba v. U. S. (C. C. A. Wis. 1924) 3 F.(2d) 270.

Testimony of the police officers who made an arrest that articles loaded on a truck were whisky and alcohol has been held sufficient to go to the jury on that issue. Miller v. U. S. (C. C. A. Ohio, 1924) 300 F. 529, certiorari denied (1924) 45 S. Ct. 123, 266 U. S. 624, 69 L. Ed. 474.

In a prosecution under section 88 of Title 18, Criminal Code and Criminal Procedure, for conspiracy to commit an offense against the United States by transporting, and having possession of, intoxicating liquor in violation of this section, circumstantial evidence held sufficient to go to the jury. Murry v. U. S. (C. C. A. Ark. 1922) 282 F. 617.

Evidence in prosecution for unlawfully possessing and transporting intoxicating

liquor held sufficient to warrant denial of motion for directed verdict of not guilty. Lowe v. U. S. (C. C. A. Or. 1922) 282 F. 597.

Evidence held insufficient to go to jury in prosecution for conspiring to violate National Prohibition Act (incorporated in this title), and for unlawfully possessing and transporting intoxicating liquor. Coleman v. U. S. (C. C. A. Ky. 1926) 11 F.(2d) 601.

Evidence of particular defendant's connection with conspiracy to violate National Prohibition Act (incorporated in this title) held insufficient to go to jury. Lewis v. U. S. (C. C. A. Mich. 1926) 11 F. (2d) 745.

148. Instructions.—Parts of charge, in prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), was held bad, in not reciting the evidence impartially, and referring to and stressing only evidence of guilt. O'Shaughnessy v. U. S. (C. C. A. Ala. 1927) 17 F.(2d) 225.

Part of charge in prosecution for conspiracy to violate prohibition law was held bad, as calculated to mislead jury to believe that the fact that coindictees had pleaded guilty could be considered in determining guilt of defendants. Id.

Where two only of seven persons jointly indicted for conspiracy to violate this section, and for other offenses, were tried together, instruction as to conspiracy count that both defendants must, or neither could be, found guilty, was held prejudicial error. Martin v. U. S. (C. C. A. N. Y. 1927) 17 F.(2d) 82.

Where witnesses had confessed to violation of prohibition law, with which defendant was charged, two of whom testified for government and one for defendant, court properly instructed jury that testimony of all three witnesses should be carefully scrutinized. Shields v. U. S. (C. C. A. Pa. 1927) 17 F.(2d) 66, reversed on other grounds (1927) 47 S. Ct. 478, 71 L. Ed. —.

Jury held improperly instructed as to considering prior convictions to supplement other evidence of guilt. Filatreau v. U. S. (C. C. A. Ky. 1926) 14 F.(2d) 659.

Statement of court in liquor prosecution that mingling of alcohol and water with burnt sugar flavoring extracts constituted manufacturing was held without error. Klein v. U. S. (C. C. A. R. I. 1926) 14 F.(2d) 35.

Charge in prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), was held not erroneous, when considered with another part of charge, to effect that defendants would be guilty if they agreed in Louisiana to possess intoxicating liquor, and in pursuance of that agreement possessed it in Mississippi. Shook v. U. S. (C. C. A. Miss. 1926) 10 F.(2d) 151, certiorari denied (1926) 46 S. Ct. 482, 271 U. S. 666, 70 L. Ed. 1141.

Instruction that evidence that one defendant furnished another copper and materials for making a still, and sugar and meal for manufacture of liquor, in violation of National Prohibition Act (incorporated in this title), if believed, would warrant finding of conspiracy, was held not erroneous, as instruction that mere sale of described materials to persons who had conspired to violate law would make seller a co-conspirator. Edenfield v. U. S. (C. C. A. Ga. 1925) 8 F.(2d) 614, reversed on other grounds (1927) 47 S. Ct. 345, 71 L. Ed. —.

In a liquor prosecution, where, in addition to testimony of accused, there was testimony from other witnesses, and evidence of accused's character, from which a jury might have had a reasonable doubt as to accused's guilt, instruction that, "if you find that the defendant testified falsely, his whole defense fails, because his case rests upon his testimony," was held error. Hermansky v. U. S. (C. C. A. Neb. 1925) 7 F.(2d) 458.

In liquor prosecution, that only one of officers who arrested defendant was called at trial was held not to create an inference or require instruction that, as a matter of law, testimony of other would have been unfavorable to prosecution. De Gregorio v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 295.

Where evidence in prosecution for possessing and transporting intoxicating liquor was sufficient for jury, there was no error in charge that jury must be satisfied beyond reasonable doubt that defendant had liquor in his possession, and must have known that the packages contained liquor with unlawful content. Schroeder v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 60.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title) instruction that, if acts of parties were committed in manner or under circumstances which, by reason of their situation and conditions surrounding them, gave rise to reasonable and just inference that they were result of previous agreement, jury could find existence of conspiracy to do those acts, was error, in view of presumption of innocence of accused until proven guilty. Terry v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 28.

In prosecution for conspiracy at certain time and place to violate National Prohibition Act (incorporated in this title) in absence of testimony tending to show that accused persons, assembled at such place, were parties to conspiracy to transport, possess or sell intoxicating liquor at another place six weeks prior thereto, or had any knowledge of such transaction, instruction permitting evidence of violation of the Act at such other

place to be considered constituted reversible error. Id.

An instruction that the law raised a presumption that liquor found in a soft drink place was there for sale, with further explanation of the meaning of "presumption," was held not erroneous. McWalters v. U. S. (C. C. A. Cal. 1925) 6 F. (2d) 224.

Instruction, in liquor prosecution, commenting on defendant's failure to protest innocence when arrested, was held not erroneous. Stroud v. U. S. (C. C. A. Tenn. 1924) 2 F.(2d) 658.

Under an indictment charging illegal sale of beer containing one-half of 1 per cent. or more of alcohol, an instruction that, though the beer contained less than such per cent. when sold, defendants might be convicted if it was sold for beverage purposes and they had knowledge that it would develop that percentage of alcohol before its intended use, was held erroneous. Cassville Beverage Co. v. U. S. (C. C. A. Wis. 1924) 1 F.(2d) 925.

In a prosecution for possession and sale of intoxicating liquor, instruction that it was necessary for detectives and prohibition officers to match their wits against the wits of men who violate the prohibition law, but that the decoy or entrapment must be fair, giving illustrations of unfair entrapment, was held sufficient. Ritter v. U. S. (C. C. A. Nev. 1923) 293 F. 187.

Evidence that defendant was proprietor of a café, that he stood by when his employee sold wine over the bar, and that he went out to another place from which he sent back more wine, was held to warrant an instruction which permitted the jury to find that the sales were made by defendant's authority. Nobile v. U. S. (C. C. A. N. J. 1922) 284 F. 253.

In prosecution for possession only of liquor, instructions referring to this section relating also to manufacture, sale, and transportation of liquor, if technically erroneous, held not reversible error. People v. Ghysels (Cal. App. 1927) 252 P. 1067.

Instruction that one procuring or buying liquor for another, or assisting him to buy or procure liquor, was not guilty of selling, though money and liquor passed through his hands, etc., was properly refused, as not justified by evidence, where money paid was found on defendant's person and had not "passed through his hands." Allen v. U. S. (C. C. A. Or. 1925) 6 F.(2d) 199.

149. —— Expressions of opinion as to facts or evidence.—Court informing jury that he thought evidence showed plain violation of law, but that this did not bind jury, was held not error. Weiderman v. U. S. (C. C. A. Okl. 1926) 10 F.(2d) 745.

In liquor prosecution, instruction that case was a plain one, was held not reversible error, irrespective of what the testimony may or may not have shown, in view of other instructions on circumstantial evidence and exclusive right of jury to pass on facts and credibility of witnesses. Brasfield v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 472, reversed on other grounds (1926) 47 S. Ct. 135, 71 L. Ed. ——.

Instruction that evidence if believed warranted a verdict of guilty under this act held not erroneous. Sunquist v. U. S. (C. C. A. Cal. 1925) 3 F.(2d) 433.

In prosecution for possession and transportation of intoxicating liquors, comment by judge on defendants' failure, when arrested, to disclaim ownership, or assert that possession was innocent, was held not erroneous, though court expressed his opinion of defendants' guilt, where he cautioned jury not to be influenced by such opinion, but to determine for themselves defendants' guilt or innocence. Stroud v. U. S. (C. C. A. Tenn. 1924) 2 F. (2d) 658.

In prosecution for having possession of intoxicating liquor in violation of the National Prohibition Act (incorporated in this title) instruction that "there does not seem to be any possible defense for that; there is no evidence here that the defendant declared this liquor; under the act, he was required to do that, if he wanted to hold it legally, but there is no evidence that he did"—was held not ground for reversal, as against contention that it in effect directed a verdict of guilty, in view of conclusion of charge that the defendant was entitled to the benefit of reasonable doubt and should be acquitted, unless the jury was satisfied beyond a reasonable doubt that he was guilty. De Jianne v. U. S. (C. C. A. N. J. 1922) 282 F. 737.

150. —— Requested instructions.—Charge on question of entrapment was held properly refused, where purchase was made by boy with marked money. Kendjerski v. U. S. (C. C. A. Ohio, 1926) 9 F.(2d) 909.

In prosecution under National Prohibition Act (incorporated in this title) for conspiring unlawfully to transport and sell whisky for beverage purposes, requested instructions held properly refused as obscure. Langley v. U. S. (C. C. A. Ky. 1925) 8 F.(2d) 815, certiorari denied (1926) 46 S. Ct. 204, 269 U. S. 588, 70 L. Ed. 427.

In prosecution of police officer and others for conspiracy to violate National Prohibition Act (incorporated in this title) where officer was not charged with failure to arrest, denial of instructions defining limitations on his power to arrest was not error. Marron v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 251.

Instruction that one procuring or buying liquor for another, or assisting him to buy or procure liquor, was not guilty of selling, though money and liquor pass-

ed through his hands, etc., was held properly refused, as not justified by evidence, where money paid was found on defendant's person and had not "passed through his hands." Allen v. U. S. (C. C. A. Or. 1925) 6 F.(2d) 199.

A requested instruction, directing acquittal if defense of entrapment was established in a sale of whisky, was held properly refused, where defendant denied one of the sales charged, and claimed entrapment as to the other only. Id.

In prosecution for possessing liquor, refusal of court to instruct, in the words of the National Prohibition Act (incorporated in this title) that all provisions of the act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented, was held not error. People v. Ghysels (Cal. App. 1927) 252 P. 1067.

151. Verdict—In general.—Conviction for manufacturing, possessing and selling intoxicating liquors and maintenance of liquor nuisance, involving a continuous conducting of a business, need not be reconcilable with prior acquittal of other similar acts alleged to have occurred on a previous date. Leonard v. U. S. (C. C. A. Tenn. 1927) 18 F.(2d) 208.

Conviction on count for possessing intoxicating liquor was illegal, where all elements necessary to it were included in another count for manufacturing, on which accused was convicted. Rouda v. U. S. (C. C. A. N. Y. 1926) 10 F.(2d) 916.

Under Volstead Act (incorporated in this title) penal provisions of which were incorporated in Wright Act (Cal.) offense of unlawful possession of intoxicating liquors is separate and distinct from that of manufacture and sale for beverage purposes, and hence not included offense, for which defendant may be convicted under Pen. Code, § 1159, in prosecution for manufacturing. People v. Arnarez (1924) 230 P. 193, 68 Cal. App. 645.

152. —— Conviction of part of defendants, or for part of offenses charged.—Jury's failure to agree as to guilt of one charged to be at head of conspiracy to violate National Prohibition Act (incorporated in this title) is not inconsistent with finding of existence of conspiracy and guilt of others. Belvin v. U. S. (C. C. A. Va. 1926) 12 F.(2d) 548, certiorari denied (1926) 47 S. Ct. 98, 71 L. Ed. ——.

Acquittal on charge of selling liquor was held not to carry with it acquittal on charge of possession of liquor sold, where sale was made by employee of defendant, and jury might have believed that it was without defendant's authority. Stockman v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 211.

Where indictment in three counts charged, first, conspiracy to violate the National Prohibition Act (incorporated in this title) to possess and sell intoxicating liquor, based on two unlawful sales made by co-conspirators, and in the second and third counts charged as specific offenses unlawful sales, alleged in count 1, verdict of not guilty on counts 2 and 3, but guilty on count 1, held not inconsistent. Collins v. U. S. (C. C. A. Okl. 1925) 7 F.(2d) 615, certiorari denied (1926) 46 S. Ct. 348, 270 U. S. 647, 70 L. Ed. 779.

Notwithstanding acquittal of druggist having permit to possess liquor of maintaining a nuisance and unlawful sale of liquor, conviction on the same evidence under count charging unlawful possession will not be disturbed, though apparently inconsistent, in that the unlawful possession could only be proved by unlawful sales. Steckler v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 59.

Acquittal on count charging unlawful transportation and possession of intoxicating liquor without permit from Commissioner of Internal Revenue, in violation of National Prohibition Act (incorporated in this title) would not preclude conviction of concealing and transporting liquors imported into the United States without submission of liquors to customs inspection or payment of duty thereon, in violation of section 497 of Title 19, Customs Duties, since the same evidence would not sustain both counts, and the one offense is not necessarily included in the other. Nounes v. U. S. (C. C. A. Tex. 1925) 4 F.(2d) 833, certiorari denied (1925) 45 S. Ct. 513, 268 U. S. 695, 69 L. Ed. 1162.

Conviction of defendant on a count charging illegal sale of liquor was held not inconsistent with his acquittal on a count charging illegal possession, since he may have participated in or aided and abetted the sale without having possession. Ward v. U. S. (C. C. A. Wash. 1925) 4 F.(2d) 772.

Where indictment charged conspiracy under section 88 of Title 18, Criminal Code and Criminal Procedure, to violate National Prohibition Act (incorporated in this title), and in another count charged unlawful possession, conviction on latter count was valid, notwithstanding disagreement as to conspiracy count. Linden v. U. S. (C. C. A. N. J. 1924) 2 F.(2d) 817.

Where an indictment in separate counts charged maintenance of a nuisance and sale of liquor, acquittal on the nuisance count was not inconsistent with a conviction on the sales count. Scribner v. U. S. (C. C. A. Wash. 1924) 2 F.(2d) 144.

An acquittal of a druggist on counts of an indictment charging unlawful possession and maintenance of a nuisance is not inconsistent with a conviction for unlawful sale of intoxicating liquors under another count, since a druggist may lawfully have possession of alcohol for sale under United States authority and be

guilty of selling that liquor unlawfully. Woods v. U. S. (C. C. A. Wash. 1923) 290 F. 957.

An acquittal on a count charging nuisance by the maintenance of premises for the unlawful sale of liquor is not so inconsistent with a conviction on other counts charging unlawful possession and unlawful sale as to render a conviction on those counts by the same jury invalid. Bilboa v. U. S. (C. C. A. Neb. 1923) 287 F. 125.

An acquittal on a count charging unlawful possession of liquor, was held not to render invalid a conviction on a second count, charging maintenance of a common nuisance by selling liquor in a designated place of business, where it did not appear that the two counts related to the same transaction. Baldini v. U. S. (C. C. A. Nev. 1923) 286 F. 133, certiorari denied (1923) 43 S. Ct. 524, 262 U. S. 749, 67 L. Ed. 1214.

Acquittal on a charge of selling liquor is not inconsistent with conviction for maintaining a common nuisance by keeping a place where liquor was unlawfully kept for sale. Panzich v. U. S. (C. C. A. Cal. 1923) 285 F. 871, certiorari denied (1923) 43 S. Ct. 524, 262 U. S. 749, 67 L. Ed. 1213.

There was no inconsistency in a verdict, finding defendants guilty of possessing intoxicating liquor and not guilty under counts charging unlawful sales, where the evidence warranted a finding of unlawful possession, even though the sales charged were not made. Millich v. U. S. (C. C. A. Alaska, 1922) 282 F. 604.

153. —— **Correction of verdict.**—Where information charged sale of intoxicating liquor consisting of "one drink of whisky," and foreman announced verdict as "guilty of selling bitters containing more than one-half of 1 per cent. alcohol," court properly questioned foreman in order to have verdict correctly recorded to comply with charge. Meyers v. U. S. (C. C. A. N. Y. 1924) 3 F.(2d) 379.

Where, in a prosecution for violating the National Prohibition Act (incorporated in this title) the jury returned a sealed verdict of guilty on the first and second counts, but, on the court questioning the foreman, foreman stated that it was the jury's intent to find defendant guilty on the first shipment, and that intent was verified by a polling of the jury, it was proper to correct the verdict to find defendant guilty on the third and fourth counts, which covered the first shipment. Anderson v. U. S. (C. C. A. N. Y. 1923) 294 F. 593.

154. —— **Setting aside.**—Motion to set aside verdict of guilty and to arrest judgment of conviction under this section denied. U. S. v. Cardwell (D. C. Mich. 1925) 9 F.(2d) 146.

SENTENCE OR JUDGMENT AND PUNISHMENT

171. Entry of judgment.—In liquor prosecution, court was authorized to enter judgments at term subsequent to rendition of verdict, where motions for new trials were interposed when verdicts were rendered, which were not acted on until such subsequent term, when further motions for new trials were made. De Witt v. U. S. (C. C. A. Md. 1925) 7 F.(2d) 104, certiorari denied (1925) 46 S. Ct. 103, 269 U. S. 577, 70 L. Ed. 421.

Motion for new trial of itself keeps case open for entry of judgment after same is acted on until an ensuing term of court, and right to postpone case for entry of judgment until next term of court exists independent of such motion for a new trial. Id.

172. **Punishment.**—See, also, notes to section 46 of this title.

Under section 244 of Title 25, Indians, sentence of $300 and imprisonment for possessing intoxicating liquor in Indian Territory, and $25 fine for transportation, under this section, was held authorized. Buchanan v. U. S. (C. C. A. Okl. 1926) 15 F.(2d) 496.

Under section 46 of this title, sentence of three months' imprisonment on conviction for unlawful sale of liquor, in violation of this section, was held warranted. Mendez v. U. S. (C. C. A. Porto Rico, 1926) 15 F.(2d) 194, certiorari denied Mendez v. Bingham (1927) 47 S. Ct. 344, 71 L. Ed. ——.

In prosecution under section 88 of Title 18, Criminal Code and Criminal Procedure, for conspiracy to commit an offense against the United States by transporting intoxicating liquor in violation of this section, the court was held authorized in imposing the punishment prescribed for a conspiracy against the United States, though such punishment was greater than that prescribed by the act for the offenses which the defendants had conspired to commit. Murry v. U. S. (C. C. A. Ark. 1922) 282 F. 617.

Though this section prescribes no penalty for the unlawful possession of intoxicating liquor, such possession is punishable under section 46 of this title, imposing a penalty of a fine of not more than $500 for the violation of any of the provisions of the act for which a special penalty is not prescribed, so that the remedy for unlawful possession is not restricted to the seizure and destruction of the liquor under section 39 of this title. Page v. U. S. (C. C. A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S. Ct. 461, 258 U. S. 627, 66 L. Ed. 799.

An information charging that defendant did "unlawfully transport in a Buick automobile certain intoxicating liquor" charges the offense specifically described in this section, for which the punishment

prescribed by section 46 of this title is a fine of not more than $500 for a first offense, and on a plea of guilty defendant cannot lawfully be sentenced to imprisonment for maintaining a common nuisance by keeping liquor in a vehicle in violation of section 33 of this title. Healey v. U. S. (C. C. A. Pa. 1921) 276 F. 711; Daley v. U. S. (C. C. A. Pa. 1921) 276 F. 713; Felmun v. U. S. (C. C. A. Pa. 1921) 276 F. 713.

One convicted under St. Cal. 1921, p. 79, adopting penal provisions of this act, which provides for no other penalties than fines for possession, transportation, and possession of still for manufacture of intoxicating liquor, in violation of this section and sections 39 and 46 of this title, may be imprisoned, under Penal Code Cal. § 1446, in proportion of one day's imprisonment for each dollar of fine until paid. Ex parte Garrison (D. C. Cal. 1924) 297 F. 509.

173. Double punishment.—Conviction for unlawful manufacture, possession, and sale of intoxicating liquor and maintenance of nuisance was held not to impose double punishment. Leonard v. U. S. (C. C. A. Tenn. 1927) 18 F.(2d) 208.

Under this section, sale of intoxicating liquor is greater crime than mere possession, and includes crime of possessing same liquor, and imposing of separate sentences for possessing and selling same liquor was improper. Gray v. U. S. (C. C. A. Mo. 1926) 14 F.(2d) 366.

Where only act of possession was possession necessarily involved in transportation, which was subject of another count, offense was single, and imposing sentence on count for possessing, and also on count for transporting, was erroneous. Schroeder v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 60.

Under an indictment charging in the first count the unlawful manufacture and possession of intoxicating liquors and in the second the possession of certain implements and materials designed for the manufacture of intoxicating liquors for unlawful use, the charges growing out of substantially the same transaction, the accused cannot be convicted under both the first and second counts and may have the conviction under the second count set aside on motion for a new trial as double punishment. Reynolds v. U. S. (C. C. A. Tenn. 1922) 280 F. 1, modified on rehearing (C. C. A. 1922) 282 F. 256, wherein the court said:

"The question of double punishment may not improperly be tested by imagining the separate counts as separate indictments, separately tried. It would seem clear that, had plaintiff in error first been tried and convicted upon the charge contained in the second count before us—that is to say, of having in her possession implements and supplies designed for the unlawful manufacture of intoxicating liquors—such conviction would not have been a bar to a subsequent prosecution for the offense of unlawfully manufacturing such liquor, and because the evidence required for conviction upon the charge of possessing implements and materials designed for manufacture would not be sufficient to convict of the charge of actual manufacture. On the other hand, had she been first convicted under an indictment charging the unlawful manufacture of intoxicating liquor, it is difficult to escape the conclusion that such conviction would bar prosecution under a later indictment for the offense of having in possession implements and materials designed for such manufacture. The evidence required for conviction of manufacturing would be sufficient to convict of having in possession implements and materials therefor, and for the reason that such manufacture would be impossible without implements and materials for the purpose. We do not understand it necessary to double punishment that each offense contain an element not found in the other. To our minds there is nothing illogical in the fact that the question of double punishment, in the contingencies stated, is made to depend upon the accidental order of prosecution. Indeed, as a practical proposition, a court, in punishment under the later conviction, would naturally take into account the prior punishment for an offense which was but an incident of the subject of the later prosecution. Where, as here, trial is had simultaneously upon more than one count, the court has ample power, by requiring election or otherwise, to protect a defendant against double conviction. Although in the instant case it does not affirmatively appear that plaintiff in error asked that the government be required to elect between the two counts, we think she was entitled to be relieved from punishment under the second count under her motions for new trial and in arrest of judgment, each of which asserts double punishment."

It has been held that a conviction of possession of property designed for the manufacture of liquor intended for use in violation of the National Prohibition Act (incorporated in this title), and of the manufacture of intoxicating liquor, will be sustained, in the absence of a showing that the two charges grew out of the same transaction. The court said:

"The point is urged, although it is unsupported by assignment of error, that the plaintiff in error could not be lawfully punished both for the manufacture of intoxicating liquor and the possession of materials and property to be used in such manufacture; the contention being that evidence to sustain either count will sustain the other. Gavieres v. U. S. (Philippine Islands, 1911) 220 U. S. 338, 31 S. Ct. 421, 55 L. Ed. 489, and Morgan v. Devine (Kan. 1915) 237 U. S. 632, 35 S. Ct. 712,

59 L. Ed. 1153, are cited, together with Reynolds v. U. S. (C. C. A. Tenn. 1922) 280 F. 1, in which it was held that the defendant could not be punished under each of two counts, one charging the manufacture of intoxicating liquors and the other the possession of implements and materials designed for such manufacture, where the charges contained in the respective counts grew out of substantially the same transaction. Not all of the evidence is contained in the bill of exceptions. There is nothing in the record before us to show that the two charges grow out of the same transaction. Necessarily, in a charge of manufacturing intoxicating liquor, there must be implied the possession of the necessary material and apparatus to manufacture it. But one engaged in such manufacture might well be charged with the possession of property intended for use in manufacturing intoxicating liquor, which was not yet actually used by him in the particular act of manufacturing liquor of which he was charged. Such was evidently the case here. There was evidence that the plaintiff in error had, elsewhere than at the dugout, large quantities of material adapted to the manufacture of liquor; and certain it is, in the absence of an assignment of error, that the record here does not show that the court in imposing sentence committed that plain error which is requisite to entitle us to review its action. The two counts are not more incompatible than counts which have been sustained by this and other courts." Raine v. U. S. (C. C. A. Nev 1924) 299 F. 407, certiorari denied (1924) 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

174. Conviction as bar.—Conviction for possessing liquor held not to bar proceedings for forfeiture of automobile for concealing therein tax-unpaid liquor to evade tax. Commercial Credit Co. v. U. S. (C. C. A. Wash. 1927) 17 F.(2d) 902.

REVIEW

181. In general.—Question certified by circuit court of appeals on error from conviction of violation of the National Prohibition Act (incorporated in this title) answered. Raffel v. U. S. (1926) 46 S. Ct. 566, 271 U. S. 494, 70 L. Ed. 1054.

A conviction of violating the National Prohibition Act (incorporated in this title) affirmed by the circuit court of appeals, held not subject to reversal in the Supreme Court of the United States, as not being supported by the testimony. Delaney v. U. S. (1924) 44 S. Ct. 206, 263 U. S. 586, 68 L. Ed. 462.

Failure to make motion for bail until three weeks before application for certiorari would be acted on, after affirmance of conviction nearly three months before, held failure to exercise proper diligence, and granting bail would not be proper exercise of judicial discretion. Jones v. U. S. (C. C. A. Md. 1926) 12 F.(2d) 708, certiorari denied (1926) 46 S. Ct. 633, 271 U. S. 682, 70 L. Ed. 1149.

Persons convicted of conspiracy to violate National Prohibition Act (incorporated in this title) held entitled to bail pending review. U. S. v. Motlow (C. C. A. 1926) 10 F.(2d) 657.

Writ of error to review orders denying motions to quash information charging violation of National Prohibition Act (incorporated in this title) denied. U. S. v. Broude (D. C. Minn. 1924) 299 F. 332.

A prosecution under the National Prohibition Act (incorporated in this title) is an action at law, to be tried and reviewed on writ of error, according to the same rules applicable to actions brought under any other federal statute, and is not reviewed as on appeal in equity. Sibona v. U. S. (C. C. A. N. J. 1923) 294 F. 272.

Where writs of error to review convictions under the National Prohibition Act (incorporated in this title) were issued out of the Supreme Court, on the assumption that the attack on the constitutionality of those acts presented a substantial question, and numerous errors were assigned besides those based on constitutional questions, the writs will not be dismissed because the constitutional questions are not substantial since a prior decision sustaining validity of that act, but will be transferred to the circuit court of appeals for review of the other assignments of error, under Act Sept. 14, 1922 (repealed). Heitler v. U. S. (Ill. 1923) 43 S. Ct. 185, 260 U. S. 438, 67 L. Ed. 338.

182. Matters reviewed or considered.—Motions for new trials and in arrest of judgment in liquor prosecution presented nothing for review, where record contained no exceptions. De Witt v. U. S. (C. C. A. Md. 1925) 7 F.(2d) 104, certiorari denied (1923) 46 S. Ct. 103.

In prosecution for violation of National Prohibition Act (incorporated in this title) omissions in court's charge, not made basis of objection below, held not such as to justify court in exercising its power under rule 2 to notice error not assigned. Frisch v. U. S. (C. C. A. N. J. 1927) 17 F. (2d) 81.

Circuit Court of Appeals will not pass on conflicting testimony, or credibility of witnesses on appeal from conviction of violating National Prohibition Act (incorporated in this title). Shevitz v. U. S. (C. C. A. Va. 1926) 12 F.(2d) 598.

Assignment of error, complaining of remark of prosecuting attorney, was held not to present anything for review, in absence of showing of related facts. Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F. (2d) 505, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. —.

Alleged error in permitting samples of intoxicating liquors to go to jury to taste and smell cannot be considered where rec-

ord does not show such to have been the case, and counsel took no steps to remedy omission in record after his attention was timely called to it. Terzo v. U. S. (C. C. A. Neb. 1925) 9 F.(2d) 357.

Weight and probative value of testimony is for jury, whose findings in that regard cannot be reviewed by circuit court of appeals. Langley v. U. S. (C. C. A. Ky. 1925) 8 F.(2d) 815, certiorari denied (1926) 46 S. Ct. 204, 269 U. S. 588, 70 L. Ed. 427.

Whether possession and sale of intoxicating liquor, of which defendant was convicted in fact, constituted but single offense, was held not reviewable in absence of demurrer to information on that ground, motion for election, or exceptions to admission of evidence or to instructions, particularly in view of sentence not greater than maximum sentence for unlawful sale. Kuehn v. U. S. (C. C. A. Idaho, 1925) 8 F.(2d) 265.

In prosecution for violation of the National Prohibition Act (incorporated in this title), by maintaining a common nuisance and unlawful possession of intoxicating liquor, reviewing tribunal was required only to review sufficiency of information to charge offense, where there was no motion for a directed verdict below, nor any exception to court's charge or rulings on the evidence. Gazzera v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 467.

Alleged error in instruction, given after conference with defendant's counsel, with their sanction and approval, to which no exception is taken, will not be considered. Nadl v. U. S. (C. C. A. Ill. 1925) 6 F.(2d) 574, certiorari denied (1925) 46 S. Ct. 101, 269 U. S. 574, 70 L. Ed. 419.

Without a bill of exceptions containing the evidence, appellate court cannot say that evidence, in prosecution for violation of National Prohibition Act (incorporated in this title), as to defendants' possession of intoxicating liquor was illegally obtained and should have been suppressed. Barlow v. U. S. (C. C. A. Mass. 1925) 6 F. (2d) 105.

In prosecution and conviction for sale of intoxicating liquor, where sentence imposed is not greater than that which could have been imposed for unlawful sale alone, conviction on count for maintaining nuisance need not be reviewed. Jordan v. U. S. (C. C. A. Ga. 1924) 2 F.(2d) 598.

In a prosecution for selling liquor in violation of this Act, in which the evidence proved two distinct sales, the court's failure to require the prosecution to elect as to sale or to instruct the jury to specify the offense of which defendant was found guilty, has been held not to be available to defendant after the return of the general verdict, in the absence of a motion for election or request for such instruction. Rolando v. U. S. (C. C. A. Utah, 1924) 1 F.(2d) 110.

183. **Harmless or prejudicial error—In general.**—Defendant was held not prejudiced by overruling special demurrer to information without requiring bill of particulars, where affidavits accompanying information set out with particularity acts charged. Myers v. U. S. (C. C. A. Neb. 1926) 15 F.(2d) 977.

In prosecution for sale and possession of liquor, where sentence of imprisonment imposed under count charging sale did not exceed maximum punishment therefor, errors involving the count for possession are not reversible. Bell v. U. S. (C. C. A. Utah, 1924) 2 F.(2d) 543.

In a prosecution for unlawfully transporting intoxicating liquor, a statement by district attorney, in opening, that accused had pleaded guilty in police court the morning after his arrest, if improper, was harmless, where the court told jury to disregard it, unless sustained by the evidence, and excluded sustaining evidence. Park v. U. S. (C. C. A. N. H. 1924) 294 F. 776.

Refusal to strike testimony as to prior purchase of liquor was held not prejudicial, in view of instruction to disregard. Chorak v. U. S. (C. C. A. Wash. 1926) 15 F.(2d) 945.

Opening remarks of prosecuting attorney, in prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), though unsupported by evidence, was held not prejudicial, in view of court's statement. Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F.(2d) 505, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. —.

184. —— **Admission or exclusion of evidence.**—Admission of evidence in liquor prosecution is not ground for reversal in absence of showing of prejudice. Lucis v. U. S. (C. C. A. Cal. 1925) 2 F.(2d) 975, certiorari denied (1925) 45 S. Ct. 511, 268 U. S. 691, 69 L. Ed. 1160.

Defendants in liquor conspiracy case were held not prejudiced by admission of evidence that codefendant bought coal for boat seized while unloading liquor. Campanelli v. U. S. (C. C. A. Alaska, 1926) 13 F.(2d) 750.

Admission in evidence of conversations by witness with others, if error was held not prejudicial, where they carried no implication of defendants' guilt. Lewis v. U. S. (C. C. A. Mich. 1926) 11 F.(2d) 745.

Refusal to permit cross-examination of government witnesses as to unfriendly feelings toward defendant though erroneous, was held not ground for reversal. Furlong v. U. S. (C. C. A. Neb. 1926) 10 F.(2d) 492.

Rejecting expert testimony discrediting plaintiff's expert and requiring defendant's expert to test liquor and give evidence as to its character though erroneous, was held not ground for reversal. Id.

Admission, in prosecution for sale of liquor, of affidavit of enforcement officer in former conviction was held not prejudicial where affiant testified in case, and opportunity for cross-examination was given. Harris v. U. S. (C. C. A. Tenn. 1926) 10 F.(2d) 358.

Admission of evidence of sale of intoxicating liquor after date of verification of information was held not prejudicial in view of sufficiency of other evidence. Landfield v. U. S. (C. C. A. Cal. 1925) 9 F. (2d) 315.

Testimony of finding of intoxicating liquor in room of guest at defendant's hotel, if erroneously admitted, was held not prejudicial, where defendant was found not guilty of count charging possession. Bernia v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 737.

In prosecution for selling liquor and for maintaining a nuisance, though testimony of prohibition director, in response to question why he had sent two witnesses to accused's drug store, that he had many complaints of "bootlegging up there in that store," was erroneously admitted, as being irrebuttable hearsay and incompetent evidence, its admission was held not prejudicial error, within section 391 of Title 28, Judicial Code and Judiciary. Hermansky v. U. S. (C. C. A. Neb. 1925) 7 F.(2d) 458.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), at certain time and place, proof that one of accused was concerned in violation of such act at another place six weeks prior thereto was prejudicial, in absence of testimony tending to connect conspiracy alleged with such offense. Terry v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 28.

Where one accused of violating liquor law admitted ownership of still, use of mash in making liquor, and possession of liquor, he was not prejudiced by improper cross-examination as to his previous arrest. Souza v. U. S. (C. C. A. Cal. 1925) 5 F.(2d) 9.

Improper cross-examination of defendant, wholly outside her examination in chief, whereby she was made to disclose facts showing her possession of beer, alcohol, and mash, requires a reversal, not only as to the counts charging possession, but those charging sale; it being impossible to say that it did not aid in her conviction on the latter. Wilson v. U. S. (C. C. A. Neb. 1925) 4 F.(2d) 888.

Error in allowing defendant to be cross-examined as to prior conviction for first violation of National Prohibition Act (incorporated in this title) for purpose of impeaching his credibility, was held to require reversal. Haussener v. U. S. (C. C. A. Neb. 1924) 4 F.(2d) 884.

In view of evidence, in prosecution for violation of prohibition law that witnesses went to defendant's place, where they bought liquor, it was held that defendant could not be prejudiced by their testimony that two men they met invited them to "a place where liquor could be purchased." Miller v. U. S. (C. C. A. Alaska, 1925) 4 F.(2d) 384.

In prosecution for sale of liquor, admission of evidence of other sales, without objection thereto until the question eliciting such evidence and the following question had been answered, was held not ground for reversal, when not substantially prejudicial in view of entire evidence. Rupinski v. U. S. (C. C. A. Mich. 1925) 4 F.(2d) 17.

185. —— **Errors in instructions.**—Where guilt of hotel proprietor of unlawful possession was clearly proved by uncontroverted testimony, inaccuracy in instruction, not limiting presumption of responsibility of a hotel proprietor to liquor found in rooms not occupied by guests, did not affect his substantial rights, and is not ground for reversal. Brown v. U. S. (C. C. A. Wash. 1925) 9 F.(2d) 588, certiorari denied (1926) 46 S. Ct. 348, 270 U. S. 646, 70 L. Ed. 778.

In a liquor prosecution, where, in addition to testimony of accused, there was testimony from other witnesses, and evidence of character of accused, from which a jury might have had a reasonable doubt as to accused's guilt, instruction that, "if you find that the defendant testified falsely, his whole defense fails, because his case rests upon his testimony," was held error and prejudicial, within section 391 of Title 28, Judicial Code and Judiciary, when considered in connection with other errors as eliminating a consideration of all other testimony in case favorable to accused, if jury believed he had testified falsely. Hermansky v. U. S. (C. C. A. Neb. 1925) 7 F.(2d) 458.

In a prosecution for violating the National Prohibition Act (incorporated in this title), an instruction not to acquit for the sole reason that a witness for the prosecution was employed to buy the liquor, though the jury should determine what credit to give to such witness, since Congress had provided "that it can be done that way," though incorrect, since no act of Congress specifically permits such practice, was not prejudicial, since it merely amounted to a statement that the law permitted such procedure, as it does. Smith v. U. S. (1922) 288 F. 259, 53 App. D. C. 53.

186. **Affirmance or reversal.**—Erroneous charge that landlord, failing to stop manufacture of liquor on premises after knowledge thereof, was guilty of conspiracy was held to require reversal both as to landlord and his codefendant. Di Bonaventura v. U. S. (C. C. A. W. Va. 1926) 15 F.(2d) 494.

Where on appeal evidence was held insufficient to sustain conviction of one of

two defendants for conspiracy to violate Volstead Act (incorporated in this title), a reversal as to other also was necessary, since he could not have conspired alone, notwithstanding evidence clearly establishes some offense or offenses by him. Turinetti v. U. S. (C. C. A. Neb. 1924) 2 F.(2d) 15.

Conviction of conspiracy to divert shipments of whisky in bond and import, transport, possess and sell it for beverage purposes, affirmed. Robinson v. U. S. (C. C. A. N. Y. 1923) 290 F. 755, certiorari denied (1923) 44 S. Ct. 6, 263 U. S. 700, 68 L. Ed. 513.

Motion for new trial after conviction under National Prohibition Act (incorporated in this title) affirmed. U. S. v. Crowley (D. C. Ga. 1922) 9 F.(2d) 927.

Convictions of possessing and selling intoxicating liquor in violation of this section, affirmed. Pincolini v. U. S. (C. C. A. Nev. 1924) 295 F. 468.

Sentence on one count under this act vacated and conviction on a second count affirmed. Friedman v. U. S. (C. C. A. Mich. 1926) 13 F.(2d) 632.

Denial of motion to quash information charging possession and sale of intoxicating liquor and maintenance of common nuisance affirmed. Poleskey v. U. S. (C. C. A. Ill. 1925) 4 F.(2d) 110.

Conviction of possession affirmed. Pinder v. U. S. (C. C. A. Fla. 1925) 4 F.(2d) 890.

Conviction for conspiracy to unlawfully possess and sell intoxicating liquor and to maintain common nuisance affirmed. Barrett v. U. S. (C. C. A. Ohio, 1925) 4 F.(2d) 317.

Conviction on four counts of an indictment charging manufacture of liquor, transportation of liquor, possession of liquor and maintenance of a nuisance in violation of National Prohibition Act (incorporated in this title) affirmed. Nicholson v. U. S. (C. C. A. Ill. 1925) 6 F.(2d) 569.

Conviction for violation of National Prohibition Act (incorporated in this title), by maintaining nuisance, and having unlawful possession of liquor, sustained. McWalters v. U. S. (C. C. A. Cal. 1925) 6 F. (2d) 224.

Conviction on count of possessing intoxicating liquors set aside; conviction of transportation affirmed. Schroeder v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 60.

Conviction under this section affirmed. Assaid v. U. S. (C. C. A. Va. 1926) 10 F.(2d) 752; Riggs v. U. S. (C. C. A. W. Va. 1924) 299 F. 273; M'Donough v. U. S. (C. C. A. Cal. 1924) 299 F. 30, certiorari denied (1924) 45 S. Ct. 95, 266 U. S. 613, 69 L. Ed. 468; Muncy v. U. S. (C. C. A. W. Va. 1923) 289 F. 780.

Conviction under National Prohibition Act (incorporated in this title) affirmed. Lau v. U. S. (C. C. A. Iowa, 1926) 13 F. (2d) 975, certiorari denied (1927) 47 S. Ct. 332, 71 L. Ed. —; Petroff v. U. S. (C. C. A. Mich. 1926) 13 F.(2d) 453; Incardonia v. U. S. (C. C. A. La. 1926) 11 F.(2d) 607; Knable v. U. S. (C. C. A. Ohio, 1925) 9 F.(2d) 567; Gemignani v. U. S. (C. C. A. Tenn. 1925) 9 F.(2d) 384; Terzo v. U. S. (C. C. A. Neb. 1925) 9 F.(2d) 357; Gray v. U. S. (C. C. A. Cal. 1926) 9 F.(2d) 337; Katz v. U. S. (C. C. A. N. Y. 1925) 7 F. (2d) 67; Delahunt v. U. S. (C. C. A. Wis. 1925) 5 F.(2d) 1014; Utley v. U. S. (C. C. A. Wash. 1925) 5 F.(2d) 963; Brown v. U. S. (C. C. A. Or. 1925) 4 F.(2d) 246; Wirt v. U. S. (C. C. A. Nev. 1925) 3 F. (2d) 1022; Wurm v. U. S. (C. C. A. Wis. 1924) 3 F.(2d) 143; Powe v. U. S. (C. C. A. Ala. 1924) 2 F.(2d) 975; D'Angelo v. U. S. (C. C. A. La. 1924) 2 F.(2d) 974; Stubbs v. U. S. (C. C. A. S. C. 1924) 2 F. (2d) 468; West v. U. S. (C. C. A. Wash. 1924) 2 F.(2d) 201; Smith v. U. S. (C. C. A. Or. 1924) 1 F.(2d) 1023; Garske v. U. S. (C. C. A. Minn. 1924) 1 F.(2d) 620; Landwirth v. U. S. (C. C. A. N. J. 1924) 299 F. 281; Tucker v. U. S. (C. C. A. Ill. 1924) 299 F. 235; Jones v. U. S. (C. C. A. S. C. 1924) 296 F. 632; Falconer v. U. S. (C. C. A. Wash. 1923) 294 F. 86, certiorari denied (1924) 44 S. Ct. 453, 264 U. S. 593, 68 L. Ed. 866; Morgan v. U. S. (C. C. A. W. Va. 1923) 294 F. 82; U. S. v. Siden (D. C. Minn. 1923) 293 F. 422, modified Siden v. U. S. (C. C. A. 1925) 9 F. (2d) 241; English v. U. S. (C. C. A. Cal. 1923) 293 F. 196; Pappas v. U. S. (C. C. A. Wash. 1923) 292 F. 982; Christianson v. U. S. (C. C. A. Mich. 1923) 290 F. 962; Sutton v. U. S. (C. C. A. Fla. 1923) 289 F. 488; Simpson v. U. S. (C. C. A. Alaska, 1923) 289 F. 188, certiorari denied (1923) 44 S. Ct. 35, 263 U. S. 707, 68 L. Ed. 517; Swilley v. U. S. (C. C. A. Miss. 1923) 287 F. 1023; U. S. v. McBride (D. C. Ala. 1922) 287 F. 214. Judgment affirmed McBride v. U. S. (C. C. A. 1922) 284 F. 416, certiorari denied (1923) 43 S. Ct. 359, 261 U. S. 614, 67 L. Ed. 827; Bilboa v. U. S. (C. C. A. Nev. 1923) 287 F. 125.

Conviction of conspiracy to violate National Prohibition Act (incorporated in this title) affirmed. Fry v. U. S. (C. C. A. Wash. 1925) 9 F.(2d) 38, certiorari denied (1926) 46 S. Ct. 347, 270 U. S. 646, 70 L. Ed. 778; Canada v. U. S. (C. C. A. Tex. 1925) 5 F.(2d) 488; Andreu v. U. S. (C. C. A. Fla. 1925) 3 F.(2d) 1019; Marin v. U. S. (C. C. A. Mich. 1926) 10 F.(2d) 271; Kepl v. U. S. (C. C. A. Wash. 1924) 299 F. 590, certiorari denied (1924) 45 S. Ct. 97, 266 U. S. 617, 69 L. Ed. 470; Hoddad v. U. S. (C. C. A. Ohio, 1923) 294 F. 536; Vannata v. U. S. (C. C. A. N. Y. 1923) 289 F. 424; Brolaski v. U. S. (C. C. A. Cal. 1922) 279 F. 1, certiorari denied (1922) 42 S. Ct. 381, 258 U. S. 625, 66 L. Ed. 797, and Newton v. U. S. (1922) 42 S. Ct. 589, 259 U. S. 586, 66 L. Ed. 1076.

Order discharging defendant convicted

under this act reversed. Cronin v. Fox (C. C. A. Neb. 1926) 11 F.(2d) 139.

Conviction under this section reversed. Chase v. U. S. (C. C. A. Tenn. 1926) 13 F.(2d) 847; Lindsly v. U. S. (C. C. A. La. 1926) 12 F.(2d) 771.

Conviction under National Prohibition Act (incorporated in this title) reversed. Fisher v. U. S. (C. C. A. W. Va. 1926) 13 F.(2d) 756; Weiderman v. U. S. (C. C. A. Okl. 1926) 10 F.(2d) 745; Bell v. U. S. (C. C. A. Cal. 1925) 9 F.(2d) 820; Gatt v. U. S. (C. C. A. Wash. 1925) 9 F.(2d) 388; Dandrea v. U. S. (C. C. A. Minn. 1925) 7 F.(2d) 861; Hermansky v. U. S. (C. C. A. Neb. 1925) 7 F.(2d) 458; Carpenter v. U. S. (C. C. A. Minn. 1924) 1 F. (2d) 314; Linden v. U. S. (C. C. A. N. J. 1924) 296 F. 104; Haughn v. U. S. (C. C. A. Ala. 1926) 13 F.(2d) 75.

Conviction for violation of Act in sale of moonshine reversed for use of evidence obtained without search warrant. Miucki v. U. S. (C. C. A. Ill. 1923) 289 F. 47.

Conviction of unlawful possession reversed. Salata v. U. S. (C. C. A. Ohio, 1923) 286 F. 125.

Conviction of conspiracy to violate National Prohibition Act (incorporated in this title) reversed. Hagen v. U. S. (C. C. A. Wash. 1925) 4 F.(2d) 801; De Villa v. U. S. (C. C. A. Neb. 1923) 294 F. 535.

187. Habeas corpus.—Application for allowance of supersedeas in habeas corpus proceedings by petitioner convicted for conspiracy to violate National Prohibition Act (incorporated in this title) denied. U. S. ex rel. Tassell v. Mathues (C. C. A. Pa. 1926) 11 F.(2d) 53.

Order granting petition for habeas corpus on behalf of defendant convicted for violations of National Prohibition Act (incorporated in this title) reversed. Cronin v. Ennis (C. C. A. Neb. 1926) 11 F. (2d) 237.

§ 13. Articles exempt from provisions of chapter; permits to manufacture; quantity of alcohol; sale of enumerated articles for beverage purposes; punishment. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this chapter if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.

(d) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for use for beverage purposes.

(e) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(f) Vinegar and preserved sweet cider.

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this chapter and as directed by the commissioner. No such manufacturer shall sell, use, or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs b, c, and d of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c, and d of this section for beverage purposes, or

any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 46 of this chapter. If the commissioner shall find, after notice and hearing as provided for in section 14 of this chapter, that any person has sold any flavoring extract, sirup, or beverage in violation of this paragraph, he shall notify such person, and any known principal for whom the sale was made, to desist from selling such article; and it shall thereupon be unlawful for a period of one year thereafter for any person so notified to sell any such extract, sirup, or beverage without making an application for, giving a bond, and obtaining a permit so to do, which permit may be issued upon such conditions as the commissioner may deem necessary to prevent such illegal sales, and in addition the commissioner shall require a record and report of sales. (Oct. 28, 1919, c. 85, Title II, § 4, 41 Stat. 309.)

Notes of Decisions

1. In general.
2. Validity.
3. Articles exempt.
4. Permits—In general.
5. —— Application and proceedings thereon.
6. —— Review by court.
7. —— Injunction.
8. —— Revocation.
9. —— Construction of permit and rights of holder.
10. Sales—Criminal offenses.
11. —— Rights and remedies under contracts.

1. In general.—The National Prohibition Act (incorporated in this title) may be enforced against a distiller of intoxicating liquor manufactured for nonbeverage purposes under Const. Amend. 18. Huth v. U. S. (C. C. A. Ky. 1924) 295 F. 37.

Where cereal beverage company under permit manufactured beer of unlawful alcoholic content, and before such alcoholic content was reduced, so that beverage could be lawfully disposed of, lost its permit to engage in such business, its retention after that date of such beer was held not unlawful. Hazelwood Brewing Co. v. U. S. (C. C. A. Pa. 1925) 3 F.(2d) 721.

Where an information charges the unlawful manufacture and possession of distilled spirits and from the defendants' plea it appears that they have complied with the National Prohibition Act (incorporated in this title) by having a still registered and obtaining a permit to operate a dealcoholizing plant, and there is no charge that any of the prohibited articles were knowingly sold, the provisions of this section and section 14 of this title are applicable, and a demurrer to the plea should be overruled. U. S. v. Mozzone (D. C. Wash. 1920) 268 F. 652.

Provisions of National Prohibition Act (incorporated in this title) limiting quantity of liquor to be taken internally that may be prescribed, apply only to beverage liquor in view of this section and other sections. Price v. Russell (D. C. Ohio, 1924) 296 F. 263.

The word "liquor" as used in this section, means liquor as defined in section 4 of this title. (1920) 32 Op. Atty. Gen. 361.

C. S. N. C., § 3375, making sections 3367–3370, 3373, prohibiting the sale and offering for sale of intoxicating liquor, inapplicable to flavoring extracts, was held not in conflict with the eighteenth amendment and the Volstead Act (incorporated in this title) in view of this section. State v. Barksdale (1921) 107 S. E. 505, 181 N. C. 621.

2. Validity.—This section forbidding sale of denatured alcohol for beverage purposes or under circumstances from which seller may reasonably infer purchaser's intention to so use it, held valid under Const. Amend. 18, being reasonably adapted to enforcement of prohibition of manufacture, sale, and transportation of intoxicating liquor for beverage purposes. Selzman v. U. S. (Ohio, 1925) 45 S. Ct. 574, 268 U. S. 466, 69 L. Ed. 1054.

3. Articles exempt.—Under this section, par. (f) "preserved sweet cider" is cider without alcohol and in which the possibility of the natural development of alcohol has been prevented through treatment or the use of some sort of preservative. Sweet cider to which has been added one-tenth of 1 per cent. of benzoate of

soda which retards, but does not prevent, the development therein of substantially the normal maximum of alcohol, has been held not "preserved sweet cider," although known in the trade as "preserved sweet cider." U. S. v. Dodson (D. C. Cal. 1920) 268 F. 397.

In another case, it was said, however, that on October 28, 1919, 90 per cent. of all the sweet cider sold in the United States was preserved by a small amount of benzoate of soda, and such cider, due to natural causes, would develop an alcoholic content in excess of one-half per cent. but would become nauseous before it became intoxicating. It was therefore held, that such cider was within this section, exempting from the provision of that act "vinegar and preserved sweet cider," prepared for market. Duffy-Mott Co. v. Blair (D. C. N. Y. 1922) 292 F. 986.

The unadulterated juice of apples preserved by the addition of one tenth of one per cent. of benzoate of soda was also held to come within the exception in this section of "preserved sweet cider" in Hildick Apple Juice Co. v. Williams (D. C. N. Y. 1920) 269 F. 184.

4. Permits—In general.—See, also, notes to section 14 of this title.

Commissioner has discretion in granting of permits to operate denaturing plants, and abuse of discretion held not shown, in view of evidence as to business associations of managing officers of applicant. Ma-King Products Co. v. Blair (Pa. 1926) 46 S. Ct. 544, 271 U. S. 479, 70 L. Ed. 1046, affirming (C. C. A. 1925) 3 F. (2d) 936.

To authorize refusal of permit, design or intent to use liquid malt in manufacture of intoxicants must be the design or intent of the seller, and not of the buyer. Stroh Products Co. v. Davis (D. C. Mich. 1925) 8 F.(2d) 773.

The Commissioner of Internal Revenue is authorized under this Act to issue permits for the manufacture of whisky, beer, wine, and the other liquors enumerated in section 4 of this title with an alcoholic content in excess of one-half of 1 per cent., for medicinal purposes. Except in the case of spirituous liquor, the quantity of liquor that may be prescribed by a physician in a given emergency or during a given period of time can not be limited by regulation, but a regulation may limit the quantity of liquor of any kind which may be called for by a single prescription. The Commissioner of Internal Revenue and the Secretary of the Treasury are without authority to limit, either locally or for the country as a whole, the number of permits to be issued for the manufacture or sale of liquor for medicinal purposes. (1921) 32 Op. Atty.-Gen. 467.

Under the National Prohibition Act (incorporated in this title) the authority of the Commissioner of Internal Revenue to issue permits for the sale in wholesale quantities of intoxicating liquor is limited to manufacturers and wholesale druggists. The authority of the Commissioner of Internal Revenue to issue permits for the sale in wholesale quantities of industrial alcohol is limited to manufacturers and wholesale druggists if said alcohol is fit for beverage purposes; but not if it is denatured so as to be unfit for such purposes. (1921) 32 Op. Atty.-Gen. 392.

Refusal of permit to use 1,100 wine gallons of denatured alcohol in manufacture of various toilet waters every 30 days, on ground that applicant had no experience in that business, or prospective customers, and had invested only $2,500, was held not abuse of discretion. Milillo v. Canfield (C. C. A. N. Y. 1926) 14 F.(2d) 113.

5. —— Application and proceedings thereon.—It has been held by the circuit court of appeals that a hearing before refusal of permit is not required, under National Prohibition Act, tits. 2, 3 (incorporated in this title). Chicago Grain Products Co. v. Mellon (C. C. A. Ill. 1926) 14 F.(2d) 362. But refusal of application for permit to deal in denatured alcohol under this section, without a hearing, was held unlawful in Smith v. Foster (D. C. N. Y. 1926) 15 F.(2d) 115.

Burden is on applicant for permit under National Prohibition Act, tits. 2, 3 (incorporated in this title), to show that he is entitled thereto. Chicago Grain Products Co. v. Mellon (C. C. A. Ill. 1926) 14 F.(2d) 362.

Design or intent on part of plaintiff manufacturer, applying for permit, that liquid malt sold by it should be used in unlawfully manufacturing intoxicants, cannot be guessed at or suspected, but must be proved as an independent fact, or by circumstances which would be proper to submit to jury. Stroh Products Co. v. Davis (D. C. Mich. 1925) 8 F.(2d) 773.

The inference that liquid malt was designed for unlawful use in manufacture of intoxicants could not be made from the intrinsic nature of the preparation, or its adaptability for such use in absence of evidence of intent Id.

On a hearing of an application for manufacturer's permit, presiding officer did not have the right, in considering testimony of witnesses, to remember his past experiences with other permittees in the same business as the applicant. Id.

In view of sections 14 and 16 of this title, denial of permit to use or to purchase specially denatured alcohol cannot be arbitrary, but must be upon definite findings of fact and law, so that a court may review them. Gautieri v. Sheldon (D. C. R. I. 1925) 7 F.(2d) 408.

Application for permit to use denatured alcohol, providing that "it is estimated that ——— wine gallons of denatured al-

cohol will be used * * * during a period of 30 days," was held not to define or limit quantities. Id.

Question whether application for permit to deal in denatured alcohol was excessive in amount was held one on which applicants were entitled to be heard before refusal of permit. Smith v. Foster (D. C. N. Y. 1926) 15 F.(2d) 115.

6. —— Review by court.—See, also, notes to section 14 of this title.

Under sections 13, 14, and 16 of this title, federal court has jurisdiction to review refusal of Commissioner of Internal Revenue for permit to deal in denatured alcohol, despite requirement for permit in sections 481 to 486 of Title 26, Internal Revenue. Smith v. Foster (D. C. N. Y. 1926) 15 F.(2d) 117.

On review of proceedings before prohibition director on application for manufacturer's permit, court could not assume that presiding officer at such hearing knew permittees with whom he had dealt, and knew proportion of those violating law and their attitude in their dealings with the government. Stroh Products Co. v. Davis (D. C. Mich. 1925) 8 F.(2d) 773.

On review of proceeding before prohibition director on application for manufacturer's permit, it was held, that evidence failed to disclose that plaintiff unlawfully designed or intended that liquid malt sold by it should be used in unlawful manner. Id.

Where the Commissioner has improperly denied a hearing upon application for permit to deal in denatured alcohol, and has refused to issue such permit, the district court will not, in proceedings to review his refusal, undertake a trial of the issues de novo or decide in the first instance, the propriety of granting or refusing the permit, but will require the reinstatement of the application and the granting of a proper hearing thereon, and will retain jurisdiction of the suit to review the Commissioner's decision after such hearing has been had. Smith v. Foster (D. C. N. Y. 1926) 15 F.(2d) 115.

7. —— Injunction.—After citation to show cause why basic permit to operate denaturing plant should not be revoked, permittee, under this section and sections 14, 16, and 21 of this title, and Regulation 61, art. 119, and Regulations, § 1903, was held not entitled to injunction against denial of withdrawal permits, issuance of which is discretionary with administrator. Olivett Distributing Co. v. Bowers (D. C. N. Y. 1926) 14 F.(2d) 318.

Permittee to manufacture toilet articles, having incidental permits to use and withdraw denatured alcohol in addition to statutory manufacturing permit, was held entitled to injunction against refusal of withdrawal permits, so long as basic permit stood unrevoked. Rock v. Blair (D. C. N. Y. 1926) 13 F.(2d) 1004.

One having permit to use denatured alcohol in manufacturing of insecticide was held not proper plaintiff to suit to enjoin prohibition authorities from interfering with dealer who has been supplying him; such dealer or seller being proper party to make complaint. Blackman v. Mellon (D. C. N. Y. 1924) 5 F.(2d) 987.

8. —— Revocation.—See, also, notes to section 21 of this title.

Revocation of permit to manufacture denatured alcohol, under regulation that all permits should expire on December 31, 1925, was held improper, without giving 15 days' notice and serving statement of facts on which revocation was based. Higgins v. Foster (C. C. A. N. Y. 1926) 12 F.(2d) 646.

In equitable proceeding against government to reinstate permits for use of alcohol for manufacturing purposes under sections 14 and 21 of this title, the government should plead clearly and specifically the derelictions on which it relies to justify and sustain the revocation, in view of this section and other sections. McGill v. Mellon (D. C. Mass. 1925) 5 F.(2d) 262.

9. —— Construction of permit and rights of holder.—Permit authorizing plaintiff to use specially denatured alcohol for the purposes specified in his application of certain date (toilet preparations), was held not limited to 50 gallons of alcohol in 30 days, though application for 600 gallons had been changed by deputy collector to read 50 gallons; it being immaterial whether plaintiff authorized the change as long as he did not voluntarily abandon his estimate of requirements, and his bond was adequate for such quantity. Gautieri v. Sheldon (D. C. R. I. 1925) 7 F.(2d) 408.

Court should not be hasty in adding technical difficulties to reasonable enforcement of prohibition law, and permit to use denatured alcohol for specific purpose should be strictly construed. Blackman v. Mellon (D. C. N. Y. 1924) 5 F.(2d) 987.

Permittee to manufacture toilet article, under this section, is subject to departmental regulations requiring permit to use and to withdraw. Rock v. Blair (D. C. N. Y. 1926) 13 F.(2d) 1004.

The fact that a company making a medicinal preparation has a permit from the Commissioner of Internal Revenue under this section, does not prevent the state from determining that such preparation is intoxicating, and capable of use as a beverage, and ordering it destroyed, since a state can legislate more rigorously than Congress under the Eighteenth Amendment without there being a conflict between federal and state legislation, there being no conflict as long as the state and federal acts can consistently stand together. State v. Certain Intoxicating

Liquors (1921) 185 N. W. 145, 192 Iowa, 629.

A permit granted under this section does not preclude an inquiry in a prosecution under a state law into the question whether the preparation is in fact used as an intoxicating beverage. State v. National Selright Assoc. (1921) 192 Iowa, 629, 185 N. W. 145.

10. Sales—Criminal offenses.—Sale of medicinal preparation to purchaser, who intended to use it as evidence, was not an offense. Sherman v. U. S. (C. C. A. Mich. 1926) 10 F.(2d) 17.

Seller of flavoring extract, containing fifty per cent. alcohol, under circumstances from which he could reasonably infer purchaser's intent to use it as beverage, was guilty of selling intoxicating liquor for beverage purposes in violation of this section. Massei v. U. S. (C. C. A. Va. 1924) 295 F. 683, certiorari denied (1924) 44 S. Ct. 404, 264 U. S. 592, 68 L. Ed. 865.

A government permit, issued to accused as a druggist, to use alcohol for nonbeverage purposes in the making of certain preparations unfit for beverage purposes, did not protect him in the sales of alcohol for beverage purposes. Hermansky v. U. S. (C. C. A. Neb. 1925) 7 F.(2d) 458.

11. —— Rights and remedies under contracts.—Whether sellers sold lemon and orange extracts containing alcohol under circumstances from which they might reasonably deduce buyer's intention to use them for purposes illegal under this section, was held for jury, in action against guarantors of purchase price. Furst v. Shows (Ala. Sup. 1926) 110 So. 299.

Where buyer's guarantors claimed that sales of extracts containing alcohol were for beverage purposes, refusing to charge that sale was legal, in absence of notice of buyer's intent to make such use, was reversible error; "notice" being equivalent to "under circumstances from which the seller might reasonably deduce" unlawful intention, found in this section. Id.

In action on account for price of flavoring extracts and patent medicines, defended on ground that goods were intoxicating liquors, evidence held to entitle plaintiff to directed verdict for admitted balance due. W. T. Rawleigh Co. v. Rutkowski (1926) 209 N. W. 625, 168 Minn. 108.

§ 14. Analysis of manufactured articles; notice to manufacturer; revocation of permit. Whenever the commissioner has reason to believe that any article mentioned in section 13 of this chapter does not correspond with the descriptions and limitations therein provided, he shall cause an analysis of said article to be made, and if, upon such analysis, the commissioner shall find that said article does not so correspond, he shall give not less than fifteen days' notice in writing to the person who is the manufacturer thereof to show cause why said article should not be dealt with as an intoxicating liquor, such notice to be served personally or by registered mail, as the commissioner may determine, and shall specify the time when, the place where, and the name of the agent or official before whom such person is required to appear.

If the manufacturer of said article fails to show to the satisfaction of the commissioner that the article corresponds to the descriptions and limitations provided in section 13 of this chapter, his permit to manufacture and sell such article shall be revoked. The manufacturer may by appropriate proceeding in a court of equity have the action of the commissioner reviewed, and the court may affirm, modify, or reverse the finding of the commissioner as the facts and law of the case may warrant, and during the pendency of such proceedings may restrain the manufacture, sale, or other disposition of such article. (Oct. 28, 1919, c. 85, Title II, § 5, 41 Stat. 309.)

Notes of Decisions

See, also, notes to section 13 of this title.

1. In general.—Person, who for more than two years, under color of appointment by federal prohibition director, purporting to act under Regulations 60, § 1900, revised March 4, 1924, issued and served citations under this section and section 21 of this title, conducted hearings, and rendered decisions in petitions

to revoke permits was "de facto officer," and his acts were valid. Troy Ice & Beverage Co. v. U. S. (C. C. A. Ill. 1926) 15 F.(2d) 609.

2. Grant or refusal of permits.—See, also, notes to section 13 of this title.

This section and section 16 of this title, vests the Commissioner of Internal Revenue with a responsible discretion in the granting of permits to manufacture liquor, and refusal of a permit to a corporation whose managing officers have been associated in business with persons charged with violating the law is proper. Ma-King Products Co. v. Blair (C. C. A. Pa. 1925) 3 F.(2d) 936, affirmed (1926) 46 S. Ct. 544, 271 U. S. 479, 70 L. Ed. 1046.

Under section 60 of this title, all manufacturers of nonintoxicating beverages therein described are equally entitled to permits, if they come within the description of such section, and the Commissioner has no authority, under this section and section 16 of this title, to refuse a permit except in exercise of judicial discretion based on legal ground, as distinguished from absolute discretion based on personal judgment. Fred Feil Brewing Co. v. Blair (D. C. Pa. 1924) 2 F.(2d) 879.

In view of this section and section 16 of this title, denial of permit to use or to purchase specially denatured alcohol cannot be arbitrary, but must be upon definite findings of fact and law, so that a court may review them. Gautieri v. Sheldon (D. C. R. I. 1925) 7 F.(2d) 408.

Under this section, manufacturer of malt beverage was entitled to hearing before its application for permit was refused or renewal of permit denied. Stroh Products Co. v. Davis (D. C. Mich. 1925) 8 F.(2d) 773.

3. Analysis of preparation.—Refusal by one having permit to use denatured alcohol in manufacture of insecticide to permit prohibition officers to take samples for analysis is unwarranted, on ground that formula is secret one, and that preparation should not be so sampled and analyzed, in absence of unfairness or unusual hardship. Blackman v. Mellon (D. C. N. Y. 1924) 5 F.(2d) 987.

4. Revocation of permits.—Revocation of permit to manufacture denatured alcohol, under regulation that all permits should expire on December 31, 1925, was held improper, without giving 15 days' notice and serving statement of facts on which revocation was based. Higgins v. Foster (C. C. A. N. Y. 1926) 12 F.(2d) 646.

Proceeding to cancel permit for denaturing plant was held properly prosecuted under section 21 of this title rather than under this section. Herman Chemical Co. v. Mellon (1926) 10 F.(2d) 887, 56 App. D. C. 92.

A liquor permit, the rights in respect of which are fixed by this section and sections 16 and 21 of this title, which entitles permittee to a review by a court of equity of the action of the Commissioner of Internal Revenue, is not revoked as a punishment for a crime, but to enforce conditions under which permit was granted. U. S. Industrial Alcohol Co. v. Blair (D. C. Pa. 1925) 6 F.(2d) 658.

Under this section, and section 21 of this title, providing for a hearing by the holder of a revoked permit to review the action of the commissioner, and Regulation 60, § 16, delegating this power to the federal Prohibition Commissioner, a federal prohibition director has no power to revoke a liquor permit. Bay State Wholesale Drug Co. v. Potter (D. C. Mass. 1922) 277 F. 529.

5. Review by court.—Revocation of a permit being ultimately the act of the Commissioner of Internal Revenue, in a proceeding to review action of the federal prohibition director in revoking a liquor permit, the Commissioner of Internal Revenue and the federal Prohibition Commissioner are necessary parties. Bay State Wholesale Drug Co. v. Potter (D. C. Mass. 1922) 277 F. 529.

Under this section and section 21 of this title, a manufacturer under a permit, whose permit has been revoked or a renewal thereof denied, has the right to have such action reviewed by a court of equity, both as to the law and facts. Vollmer Beverage Co. v. Blair (D. C. Pa. 1924) 2 F. (2d) 469.

Proceeding for review of action of Commissioner of Internal Revenue in revoking liquor permit, under this section and section 21 of this title, is a proceeding in the nature of a bill of review, though trial in such proceedings is de novo. Hoell v. Mellon (D. C. N. Y. 1925) 4 F.(2d) 859.

Such action should be commenced within reasonable time after Commissioner's decision. Id.

In such action there is no presumption that permittee falsified books or otherwise acted in bad faith. Id.

The question as to whether the Commissioner committed error at law is whether there was any legal evidence before the Commissioner on which he could base a decision that plaintiff's permit should be revoked. Id.

Plaintiff held entitled to maintain bill in equity under this section and section 16 of this title, to review commissioner's denial of his permit to withdraw specially denatured alcohol in quantities desired. Gautieri v. Sheldon (D. C. R. I. 1925) 7 F.(2d) 408.

Review of refusals to grant permits for use of alcohol for manufacturing purposes under section 16 of this title, or orders of revocation under this section and section 21 of this title, by court of equity

"as the facts and law of the case may warrant," requires a trial of the case and not a trial of the administrative trial. McGill v. Mellon (D. C. Mass. 1925) 5 F.(2d) 262.

In equitable proceeding against government to reinstate permits for use of alcohol for manufacturing purposes under this section and section 21 of this title, the government should plead clearly and specifically the derelictions on which it relies to justify and sustain the revocation. Id.

In proceeding in equity by manufacturer under this section, decree granted for plaintiff. Duffy-Mott Co. v. Blair (D. C. N. Y. 1922) 292 F. 986.

6. Injunction.—Where plaintiff, having permit to use denatured alcohol in manufacturing of insecticide without warrant, refused to permit prohibition agents to take samples of his product for analysis, with result that Commissioner of Internal Revenue issued citation for hearing on question of revoking permit, temporary injunction against interference with purchases by plaintiff pending hearing on citation was held unwarranted. Blackman v. Mellon (D. C. N. Y. 1924) 5 F.(2d) 987.

It will not be assumed on affidavits alone, on motion for temporary injunction, that holder of permit to use denatured alcohol in manufacturing of insecticide has been unjustly or maliciously harassed or subjected to unnecessary examination by Commissioner of Internal Revenue or those acting under him. Id.

Under this section and sections 12 and 16 of this title and sections 1110, 1120, and 1124 of Regulations 60, Revised March, 1924, relating to withdrawal of wine for sacramental purposes, priest, who did not hold permit to purchase wine at time of hearing, was held not entitled to enjoin Prohibition Director and other federal officers from interfering with his procurement of wine for sacramental and like religious rites, pending investigation. Gardner v. Mellon (C. C. A. Cal. 1925) 5 F.(2d) 954.

§ 15. Change of formula of preparations being used as beverage or for intoxicating beverage purposes. If the commissioner shall find after hearing, upon notice as required in section 14 of this chapter, that any article enumerated in subdivisions b, c, d, or e of section 13 of this chapter is being used as a beverage, or for intoxicating beverage purposes, he may require a change of formula of such article and in the event that such change is not made within a time to be named by the commissioner he may cancel the permit for the manufacture of such article unless it is made clearly to appear to the commissioner that such use can only occur in rare or exceptional instances, but such action of the commissioner may by appropriate proceedings in a court of equity be reviewed, as provided for in section 14 of this chapter: *Provided*, That no change of formula shall be required and no permit to manufacture any article under subdivision (e), section 13, of this chapter, shall be revoked unless the sale or use of such article is substantially increased in the community by reason of its use as a beverage or for intoxicating beverage purposes. (Nov. 23, 1921, c. 134, § 2, 42 Stat. 222.)

Historical Note

This section is a part of § 2 of an Act entitled "An act supplemental to the National Prohibition Act [incorporated in this title]," cited in the credit to the text. See the historical note to section 2 of this title.

Cross-References

Portions of the original text of this section omitted here are incorporated in sections 18, 20, and 56 of this title.

Notes of Decisions

See notes to section 18 of this title.

§ 16. Permits to manufacture, sell, purchase, transport, or prescribe liquors; exceptions; expiration of permits; wine for sacramental purposes. No one shall manufacture, sell, purchase, trans-

port, or prescribe any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided, and except that any person who in the opinion of the commissioner is conducting a bona fide hospital or sanatorium engaged in the treatment of persons suffering from alcoholism, may, under such rules, regulations, and conditions as the commissioner shall prescribe, purchase and use, in accordance with the methods in use in such institution, liquor, to be administered to the patients of such institution under the direction of a duly qualified physician employed by such institution.

All permits to manufacture, prescribe, sell, or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided*, That the commissioner may without formal application or new bond extend any permit granted under this chapter or laws now in force after August 31 in any year to December 31 of the succeeding year: *Provided further*, That permits to purchase liquor for the purpose of manufacturing or selling as provided in this chapter shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this chapter or any law of the United States or of any State regulating traffic in liquor. No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

The commissioner may prescribe the form of all permits and applications and the facts to be set forth therein. Before any permit is granted the commissioner may require a bond in such form and amount as he may prescribe to insure compliance with the terms of the permit and the provisions of this chapter. In the event of the refusal by the commissioner of any application for a permit, the applicant may have a review of his decision before a court of equity in the manner provided in section 14 of this chapter.

Nothing in this chapter shall be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine

for sacramental purposes, or like religious rites, except this section (save as the same requires a permit to purchase) and section 22 hereof, and the provisions of this chapter prescribing penalties for the violation of either of said sections. No person to whom a permit may be issued to manufacture, transport, import, or sell wines for sacramental purposes or like religious rites shall sell, barter, exchange, or furnish any such to any person not a rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose by any church or congregation, nor to any such except upon an application duly subscribed by him, which application, authenticated as regulations may prescribe, shall be filed and preserved by the seller. The head of any conference or diocese or other ecclesiastical jurisdiction may designate any rabbi, minister, or priest to supervise the manufacture of wine to be used for the purposes and rites in this section mentioned, and the person so designated may, in the discretion of the commissioner, be granted a permit to supervise such manufacture. (Oct. 28, 1919, c. 85, Title II, § 6, 41 Stat. 310.)

Notes of Decisions

1. Validity.
2. Power to make regulations.
3. Necessity of permit.
4. —— To sell and to purchase.
5. Permit for manufacture of whisky, etc.
6. Persons entitled to permit.
7. Form of permit.
8. Bond for permit.
9. —— Liability on bond.
10. Grant or refusal of permit.
11. Revocation or expiration of permit.
12. Review of decision respecting permit.
13. Operation and effect of permit.
14. —— Permit obtained by false representations.
15. —— Removal of liquor from government warehouse without payment of tax.
16. —— Transportation to and from bonded warehouse.
17. —— Injunction against detention of liquor.
18. Pleading permit.
19. Evidence as to permit.
20. Permit as evidence.
21. Offenses in general.
22. —— Jurisdiction.
23. —— Indictment.
24. —— Evidence.
25. —— Affirmance.
26. Punishment for violation of section.

1. Validity.—The provisions of National Prohibition Act, tit. 2 (incorporated in this title), conferring power on the Commissioner of Internal Revenue to issue permits for the manufacture or sale of liquor, and to revoke the same, and necessarily vesting him with a discretion in the matter, subject to judicial review, are within the police power of Congress as granted by section 2 of the Eighteenth Amendment, and valid. Schnitzler v. Yellowley (D. C. N. Y. 1923) 290 F. 849.

2. Power to make regulations.—"The permit issued by the Commissioner is in no sense a contract; it is exactly what it is called, a permit, and the power to make regulations contained in the act is not a power to be once exercised and then lost forever, but it is a power to make regulations from time to time as the necessities may arise." Millstone v. Yellowley (D. C. N. Y. 1923) 290 F. 855. It was held in this case that a regulation providing that in the interests of the public health only liquors bottled in bond would be permitted to be withdrawn from warehouses was reasonable and valid.

3. Necessity of permit.—Under this section, prohibiting the transportation, etc., of liquor without a permit, a collector of internal revenue, having the custody of liquor in a bonded warehouse, is not allowed to accept any money as taxes on such liquor from, or to affix and cancel stamps thereon for, or to deliver such liquor to, any persons except those who present to him a permit issued by the Commissioner of Internal Revenue. Cornell v. Moore (D. C. Mo. 1920) 268 F. 993, affirmed (1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332.

Double strength tincture of Jamaica ginger being classified by federal prohibition authorities as unfit for beverage purposes, for the sale of which no permit is required, conviction of druggist under La. Act No. 39 of 1921, § 1, of possession of such extract for sale for nonbeverage purposes without permit from federal authorities, is unwarranted, notwithstanding finding of fact by trial court that such extract was fit for beverage purposes, within section 8, as amended by Act No. 57 of 1924. State v. Sandman (1925) 105 So. 451, 159 La. 451.

4. —— To sell and to purchase.—Under this section, and section 12 of this title, and the regulations adopted by the Commissioner of Internal Revenue thereunder, it is not sufficient to make a sale of whisky valid that the purchaser have a permit to sell such whisky, but it is also necessary that the seller have a permit to sell and the purchaser to purchase. And in an action to recover on a note given for the purchase price of whisky, the burden is on the plaintiff to prove that the sale was legal by proving that the seller and the buyer had the permits required by National Prohibition Act (incorporated in this title), and by the regulations thereunder, to render the sale legal. Adler v. Zimmerman (1922) 233 N. Y. 431, 135 N. E. 840, reversing (1921) 189 N. Y. S. 937, 198 App. Div. 927.

Under this section and sections 14 and 16 of this title, and sections 1110, 1120, and 1124 of Regulations 60, Revised March, 1924, relating to withdrawal of wine for sacramental purposes, priest, who did not hold permit to purchase wine at time of hearing, held not entitled to enjoin Prohibition Director and other federal officers from interfering with his procurement of wine for sacramental and like religious rites, pending investigation. Gardner v. Mellon (C. C. A. Cal. 1925) 5 F. (2d) 954.

Where a contract for the sale and delivery of wine "for lawful use and under government permit" provided for shipment by a certain date, provided the buyer furnished necessary permits, and gave the buyer the option for 15 days after the date of the contract to reject the contract, but did not otherwise contain any provision relieving him in case of his failure to obtain the necessary permits, such failure was a breach of the contract, and not an excuse for the buyer's nonperformance. Ciocca-Lombardi Wine Co. v. Fucini (1923) 198 N. Y. S. 114, 204 App. Div. 392, affirmed (1923) 142 N. E. 293, 236 N. Y. 584.

Purchase of whisky by wholesale liquor dealer without permit therefor after federal Enforcement Act (incorporated in this title), became effective, was held to be illegal transaction and one prohibited by law, although both buyer and seller had sale permits. W. L. Weller & Sons v. Western Union Telegraph Co. (1925) 276 S. W. 538, 210 Ky. 633.

The regulations under National Prohibition Act (incorporated in this title) requiring a seller's permit to sell intoxicating liquor for nonbeverage purposes, apply mainly, if not wholly, to those regularly engaged in the business of selling, and so, where buyer obtained the required buyer's permit to purchase specified liquor from a specified seller, the seller, who was not regularly engaged in the business, was not guilty of violating the law because he did not have a seller's permit. Smulyan v. U. S. (C. C. A. Ohio, 1923) 293 F. 283.

Since the adoption of the Eighteenth Amendment and the positive concurrent legislation by Congress and the Legislature, the law in Pennsylvania relating to the sale of liquors is as follows: (1) No one may lawfully sell vinous, spirituous, malt or brewed liquors for beverage purposes containing one-half of 1 per centum or more of alcohol by volume. It is forbidden by the Eighteenth Amendment as enforced by the National Prohibition Act (incorporated in this title). (2) No one may lawfully sell vinous, spirituous, malt, or brewed liquors fit for use for beverage purposes, containing less than one-half of 1 per centum of alcohol by volume, at retail, in this commonwealth, unless duly licensed to do so under the provisions of Act May 13, 1887 (P. L. 108), as amended by Act May 5, 1921 (P. L. 407), the Woner Act. (3) No one may lawfully sell vinous, spirituous, malt or brewed liquors fit for use for beverage purposes, and containing one-half of 1 per centum or more of alcohol by volume, for nonbeverage purposes, unless he has received a permit from the Commissioner of Internal Revenue authorizing him to do so, in accordance with the regulations of the National Prohibition Act (incorporated in this title); and not even then may he do so at wholesale in Pennsylvania until he has applied to the court of quarter sessions of the proper county for a license authorizing such sale, in accordance with Act June 9, 1891, aforesaid, as amended (Pa. St. 1920, § 14051), and been found by that court to be a fit person to have such license. In re Application of Pen-Mar Distilling Co. (1922) 80 Pa. Super. Ct. 221.

A sales contract for the sale of liquor has been construed with respect to the duties of the respective parties to procure a "basic" and "withdrawal" permit in Kahn v. Rosenstiel (D. C. N. Y. 1924) 298 F. 656.

5. Permit for manufacture of whisky, etc.—The Commissioner of Internal Revenue is authorized under the National Prohibition Act (incorporated in this title) to issue permits for the manufacture of whisky, beer, wine, and the other liquors enumerated in section 4 of this title, with an alcoholic content in excess of one-half of 1 per cent., for medicinal purposes. (1921) 32 Op. Atty. Gen. 467.

6. Persons entitled to permit.—Under this section, and sections 12 and 23 of this title, manufacturers and wholesale druggists only are authorized to sell liquor at wholesale, and a jobber is not entitled to a permit to withdraw whisky from bond for sale to druggists. Small Grain Distilling & Drug Co. v. Hamilton (C. C. A. Ky. 1921) 276 F. 544.

The authority of the Commissioner of Internal Revenue to issue permits for

the sale in wholesale quantities of intoxicating liquor is limited to manufacturers and wholesale druggists. (1921) 32 Op. Atty. Gen. 392.

Under sections 57 to 60 of this title all manufacturers of nonintoxicating beverages therein described are equally entitled to permits, if they come within the description of such sections, and the Commissioner has no authority, under this section and section 14 of this title, to refuse a permit except in exercise of judicial discretion based on legal ground, as distinguished from absolute discretion based on personal judgment. Fred Feil Brewing Co. v. Blair (D. C. Pa. 1924) 2 F.(2d) 879.

A dealer in ecclesiastical supplies cannot be granted a permit to deal in sacramental wines. But when a rabbi, minister, or priest is duly appointed by the official head of the diocese or other ecclesiastical jurisdiction of his church to care for the manufacture or distribution of sacramental wines within the territory of such ecclesiastical jurisdiction, the Commissioner of Internal Revenue may grant such designated church official a permit to supervise the manufacture and distribution of sacramental wines within his specified territory. (1922) 33 Op. Atty. Gen. 192.

7. Form of permit.—Though this section authorizes the commissioner to prescribe the form of permits for possession and sale of intoxicating liquor he cannot evade the plain provision of the act, so that permits which do not comply with the statutory requirements that they state the acts that are permitted and specify the quantity and kind of liquor to be purchased are not a protection to the possessor of liquor. U. S. v. Masters (D. C. Pa. 1920) 267 F. 581.

8. Bond for permit.—Bond known as Form 738 which was formerly in use under the War Prohibition Act (temporary) if substituted for the present bond known as Form 1408, would be legally sufficient to secure compliance with Title II of the National Prohibition Act (incorporated in this title) and the internal revenue laws relating to distilled spirits and wines. (1920) 32 Op. Atty. Gen. 365.

Punitive bonds, such as bond given to obtain permit to sell intoxicating liquors for nonbeverage purposes, together with statutory provisions and regulations under which they are given, should be construed strictly. O'Kane v. Lederer (D. C. Pa. 1923) 4 F.(2d) 418, writ of error dismissed Lederer v. McGarvey (1926) 46 S. Ct. 534, 271 U. S. 342, 70 L. Ed. 977.

"While the Act declares that the purpose of the bond is 'to insure compliance with the terms of the permit and the provisions of this title,' it also authorizes the Commissioner to fix its form and amount. The power vested in him to fix the form of bond, clearly gave him the right to determine the obligations of it and to name the condition that would constitute a breach." U. S. v. Wandmaker (C. C. A. N. D. 1923) 292 F. 24.

9. —— Liability on bond.—Bond given by permittee conditioned on his compliance with laws respecting sale and use of distilled spirits is an indemnity and not a forfeiture bond. U. S. v. Zerbey (1926) 46 S. Ct. 532, 271 U. S. 332, 70 L. Ed. 973.

So where bond filed under this section, to obtain permit to sell for nonbeverage purposes, was conditioned on compliance with all laws, and provided that it should insure payment of any taxes and penalties imposed, the face of bond was not fixed penalty or measure of liability for its breach, but a limit of liability. O'Kane v. Lederer (D. C. Pa. 1923) 4 F. (2d) 418, writ of error dismissed Lederer v. McGarvey (1926) 46 S. Ct. 534, 271 U. S. 342, 70 L. Ed. 977.

And where the principals in a $10,000 bond given to obtain the permit to sell liquor for nonbeverage purposes, and conditioned that they would not violate the National Prohibition Act (incorporated in this title), did violate it and paid a $3,000 fine imposed, it was held that a subsequent action against the surety for the full $10,000 would not lie. U. S. v. U. S. Fidelity, etc., Co. (D. C. N. Y. 1924) 1 F.(2d) 335.

And where a bond running to the United States, given to insure compliance with the conditions of a permit to purchase liquor for manufacturing purposes, under this section and section 13 of this title, provided that Liberty or other bonds which had been deposited with the director in a sum equal to the face of the bond might be sold, "and the proceeds applied to the payment of internal revenue taxes, interest and penalties, which may be due, and in satisfaction of any liabilities incurred hereunder, * * * and the residue, if any, paid to said principal," it was obviously for purpose of indemnity for unpaid taxes, interest, or penalties which might be imposed, and therefore, on breach of condition, the whole amount thereof was not forfeited, and the obligation of a bond with sureties, instead of with a deposit of collateral, though not containing such provision, being for the same purpose, was no different. U. S. v. Wandmaker (C. C. A. N. D. 1923) 292 F. 24.

And in suit to recover liquor taxes, paid under protest, counterclaim for full amount of bond given to obtain permit to sell, set up in affidavit of defense, was held insufficient; amount of such bond being, not measure, but limit, of plaintiff's liability for breach of its conditions. O'Kane v. Lederer (D. C. Pa. 1923) 4 F.(2d) 418, writ of error dismissed Lederer v. McGarvey (1926) 46 S. Ct. 534, 271 U. S. 342, 70 L. Ed. 977.

But see (1920) 32 Op. Atty. Gen. 365, holding that bonds on Forms 738 and

1408 are forfeiture bonds and hence the surety on either bond would be liable for the face value thereof and, upon breach of the conditions in either bond, the Government would be entitled to recover the taxes and penalties provided for by law.

A bond running to the United States to secure compliance with the conditions of a permit to purchase liquor for manufacturing purposes, under this section and section 13 of this title, providing that if the principal shall comply with the requirements of the law "respecting the sale or use of distilled spirits and wines for other than beverage purposes," the obligation of the bond shall be void, was not binding on the principal and sureties for the sale of liquor for beverage purposes, though under section 13 the sale of liquor for beverage purposes under such a permit is prohibited, and under section 46 of this title the seller renders himself liable to criminal prosecution. U. S. v. Wandmaker (C. C. A. N. D. 1923) 292 F. 24.

Litigant's admission in Supreme Court that he had no right to make counterclaim based on bond held to require dismissal of question certified by circuit court of appeals, whether bond was a forfeiture or indemnity bond. Lederer v. McGarvey (1926) 46 S. Ct. 534, 271 U. S. 342, 70 L. Ed. 977.

10. Grant or refusal of permit.—Refusal of prohibition director to grant institute for cure of alcoholism continuance of prior liquor permit was held not arbitrary, in view of evidence of its violation of National Prohibition Act (incorporated in this title). Shelper v. Andrews (C. C. A. Pa. 1927) 17 F.(2d) 81.

Refusal of permit to deal in denatured alcohol is not an act purely administrative, and when questions are seriously controverted opportunity to be heard should be granted under this section. Smith v. Foster (D. C. N. Y. 1926) 15 F. (2d) 115.

Commissioner of Internal Revenue exercises judicial discretion in passing on evidence in support of application for permit to export nonbeverage liquor. Blair v. Stewart Distilling Co. (1926) 12 F.(2d) 838, 56 App. D. C. 303.

Commissioners' denial in part of application for permit to export nonbeverage liquor held not abuse of discretion. —Id.

In view of this section and section 14 of this title, denial of permit to use or to purchase specially denatured alcohol cannot be arbitrary, but must be upon definite findings of fact and law, so that a court may review them. Gautieri v. Sheldon (D. C. R. I. 1925) 7 F.(2d) 408.

Denial of the right to have a permit to use or to purchase specially denatured alcohol under this section and section 14 of this title, without a hearing, is not due process of law. Id.

This section and section 14 of this title vests the Commissioner of Internal Revenue with a responsible discretion in the granting of permits to manufacture liquor, and refusal of a permit to a corporation whose managing officers have been associated in business with persons charged with violating the law is proper. Ma-King Products Co. v. Blair (C. C. A. Pa. 1925) 3 F.(2d) 936, affirmed (1926) 46 S. Ct. 544, 271 U. S. 479, 70 L. Ed. 1046.

11. Revocation or expiration of permit.—It is not clear that Treasury Decision No. 3773, providing that all permits should expire on December 31, 1925, is not a reasonable regulation within the power of the department, though by the terms of permits affected they were to be in effect until surrendered or canceled. Cywan v. Blair (D. C. Ill. 1926) 16 F.(2d) 279.

The provision of this section that permits shall expire on December 31st after their issuance, applies to a basic permit to use denatured alcohol for a manufacturing purpose. Id.

After promulgation of Treasury Decision No. 3773, providing that all basic permits for using denatured alcohol should expire on December 31, 1925, an application by a permittee for renewal of his permit, made without reservations, and proceedings thereon, in which he participated, constituted an election to proceed in harmony with, and not against, such Treasury Decision, and worked a surrender of the permit. Id.

Hearing as in case of cancellation of permit is not required where permit expires by lapse of time. Chicago Grain Products Co. v. Mellon (C. C. A. Ill. 1926) 14 F.(2d) 362.

Revocation of permit to manufacture denatured alcohol, under regulation that all permits should expire on December 31, 1925, was held improper, without giving 15 days' notice and serving statement of facts on which revocation was based. Higgins v. Foster (C. C. A. N. Y. 1926) 12 F.(2d) 646.

A liquor permit, the rights in respect of which are fixed by this section and sections 14 and 21 of this title, which entitles permittee to a review by a court of equity of the action of the Commissioner of Internal Revenue, is not revoked as a punishment for a crime, but to enforce conditions under which permit was granted. U. S. Industrial Alcohol Co. v. Blair (D. C. Pa. 1925) 6 F.(2d) 658.

12. Review of decision respecting permit.—The Commissioner of Internal Revenue is a necessary party in a suit by pharmacists to restrain a local prohibition director from refusing them permits to buy liquors to be dispensed for nonbeverage purposes in excess of a limit fixed in their permit to sell as issued by the prohibition commissioner, the plaintiffs denying the legality of the restriction even if authorized by regulations of the Commis-

sioner of Internal Revenue. Gnerich v. Rutter (Cal. 1924) 265 U. S. 388, 44 S. Ct. 532, 68 L. Ed. 1068, reversing Gnerich v. Yellowley (C. C. A. 1922) 277 F. 632, wherein the court said:

"The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given an opportunity to defend his direction and regulations."

And under this section, Commissioner of Internal Revenue was held necessary party to suit to secure permit authorizing transportation by stockholders of pro rata share of ale stored in warehouse of corporation at time of its dissolution. Chamberlain v. Lembeck (C. C. A. N. J. 1927) 18 F.(2d) 408.

And under this section and section 21 of this title, Commissioner of Internal Revenue is necessary party to proceeding in equity, under section 21, to review order of Prohibition Director revoking permit granted under this section. Dami v. Canfield (D. C. N. Y. 1925) 5 F.(2d) 533.

But see Lacks v. Mitchell (D. C. Cal. 1921) 278 F. 393, holding that under § 4, subd. 7 of this title, providing that any act authorized to be done by the Commissioner may be performed by any assistant, or any one designated by him for that purpose, the local prohibition director, who refused an application for a permit, is a proper party defendant and the only necessary party to a proceeding in equity under this section to review the decision.

Court may review refusal of permit to deal in denatured alcohol. Smith v. Foster (D. C. N. Y. 1926) 15 F.(2d) 115.

Under this section district court, in reversing decision of Commissioner refusing permit to deal in denatured alcohol, may grant relief required to protect against further abuse of administrative authority. Id.

Decision of Commissioner of Internal Revenue on application for permit to export nonbeverage liquor ought not be disturbed, except for an abuse of discretion. Blair v. Stewart Distilling Co. (1926) 12 F. (2d) 838, 56 App. D. C. 303.

Plaintiff held entitled to maintain bill in equity under this section and section 14 of this title to review commissioner's denial of his permit to withdraw specially denatured alcohol in quantities desired. Gautieri v. Sheldon (D. C. R. I. 1925) 7 F.(2d) 408.

Review of refusals to grant permits for use of alcohol for manufacturing purposes under this section, or orders of revocation under sections 14 and 21 of this title, by court of equity "as the facts and law of the case may warrant," requires a trial of the case and not a trial of the administrative trial. McGill v. Mellon (D. C. Mass. 1925) 5 F.(2d) 262.

In equitable proceeding against government to reinstate permits for use of alcohol for manufacturing purposes under sections 14 and 21 of this title, the government should plead clearly and specifically the derelictions on which it relies to justify and sustain the revocation, in view of this section and other sections of this title. Id.

Under this section, authorizing review of commissioner's refusal of renewal permit, court will not compel issuance of permit pending hearing to review decision refusing renewal for substantial reasons. Ginsberg v. Yellowley (D. C. N. Y. 1923) 290 F. 262.

Decree dismissing suit to restrain prohibition director for California from giving effect to restriction embodied in permit, reversed. Gnerich v. Rutter (Ct. Cl. 1924) 44 S. Ct. 532, 265 U. S. 388, 68 L. Ed. 1068.

13. Operation and effect of permit.—Permits giving authority to sell intoxicating liquors for other than beverage purpose, and to use it in the manufacture of certain preparations stated, did not give authority to store the liquor in the basement of a hotel, while the holder of the permits claimed to be altering his paint shop to carry on the stated business. U. S. v. Masters (D. C. Pa. 1920) 267 F. 581.

A permit cannot afford ground for the reclaiming of liquor lawfully seized, where there is evidence that it was intended for use as a beverage in violation of law. In re Search of No. 15 East Third St., Borough of Manhattan, New York City (D. C. N. Y. 1922) 284 F. 914.

Permit under which brewery was operating did not protect it from search under valid search warrant. Daeufer-Lieberman Brewing Co. v. U. S. (C. C. A. Pa. 1925) 8 F.(2d) 1.

A druggist who has permit to possess liquor will not be protected in possession, if it is shown that he habitually engages in unlawful sales. Steckler v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 59.

A United States government permit does not authorize sale of alcoholic liquor in violation of state laws. Hazle Drug Co. v. Wilner (1925) 131 A. 286, 284 Pa. 361.

Whisky obtained by permit which is not regular is forfeitable while in carrier's possession, notwithstanding good faith of claimants. Avignone v. U. S. (C. C. A. N Y. 1926) 12 F.(2d) 509.

Where a permit has been issued and the liquor is in the possession of the permittee, it is not subject to seizure because of a charge of unlawful sale. Friedman v. Yellowley (D. C. N. Y. 1923) 290 F. 248.

14. —— Permit obtained by false representations.—Since this section does not authorize issuance of a permit to transport liquor except for nonbeverage purposes, a permit obtained thereunder by false representations as to its purpose affords no protection for transportation for illicit purposes. On a charge of conspiracy to illegally procure and transport liquor in violation of this section, evidence that in organizing a corporation, in whose name a permit was obtained, defendants used fictitious names, was held competent as tending to show a fraudulent purpose. Reid v. U. S. (C. C. A. Ohio, 1921) 276 F. 253.

15. —— Removal of liquor from government warehouse without payment of tax.—A permit for the removal of distilled spirits from a government warehouse will not justify such removal without the payment of the tax imposed thereon, or in the absence or without the knowledge of the storekeeper, in violation of sections 393, 401, and 404 of Title 26, Internal Revenue. U. S. v. Freidericks (D. C. N. J. 1921) 273 F. 188.

16. —— Transportation to and from bonded warehouse.—Section 57 of this title, providing that nothing therein shall prevent the transportation of liquor to bonded warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited, permits transportation to bonded warehouses, but not from such warehouses, except when being transported to a wholesale druggist for sale to him for purposes not prohibited, especially in view of this section, permitting distilled spirits to be withdrawn from such warehouses for denaturing or for deposit in a bonded warehouse. Cornell v. Moore (Mo. 1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332, affirming (D. C. 1920) 267 F. 456.

17. —— Injunction against detention of liquor.—Mandatory injunction to prevent enforcement officers from detaining liquors which plaintiff claimed under permits was held proper under the facts shown in Hart v. Yellowley (C. C. A. N. Y. 1922) 284 F. 245.

18. Pleading permit.—Statements in petition for breach of contract for sale of whisky that plaintiff was wholesale whisky dealer, under regulations of Internal Revenue Department of federal government, and was engaged in buying whisky and selling it to wholesale and retail druggist under provision of National Prohibition Act (incorporated in this title), and regulations of duly constituted authorities of United States, was held sufficient allegation of legality, and not mere conclusions of pleader. Petrucci v. Guthrie (1925) 271 S. W. 67, 208 Ky. 405.

A complaint, in an action by a broker to recover on a contract for services in selling and buying intoxicating liquor, which alleged that the vendors and vendees and others engaged in the transactions were duly authorized and duly permitted to buy and sell liquor in accordance with the National Prohibition Act (incorporated in this title), and the rules and regulations thereunder, was held insufficient to relieve the contract from apparent illegality under the act. Lundy v. Orr (1923) 199 N. Y. S. 480, 205 App. Div. 296.

19. Evidence as to permit.—Where a witness for the prosecution had testified he procured a permit to engage in the wholesale liquor business at the solicitation of defendant and gave a power of attorney with reference thereto, testimony that the power of attorney was found in the local prohibition office was admissible to corroborate the witness, and was not objectionable as hearsay. Brolaski v. U. S. (C. C. A. Cal. 1922) 279 F. 1, certiorari denied (1922) 42 S. Ct. 381, 258 U. S. 625, 66 L. Ed. 797, and Newton v. U. S. (1922) 42 S. Ct. 589, 259 U. S. 586, 66 L. Ed. 1076.

The burden of showing the possession of a permit under this section is on the person accused of selling intoxicating liquor. Albedt v. U. S. (C. C. A. Ohio, 1922) 281 F. 511.

In a prosecution under this section where it is alleged that the defendants had transported intoxicating liquor without first obtaining the required permit, it is not necessary for the government to prove the averment of a failure to obtain the permit, the court saying:

"It was not incumbent on the prosecution to adduce evidence to support such a negative averment, which, if untrue, readily could have been disproved by the defendants producing the permit, which, if it was issued, presumably was in their possession or under their control." Sharp v. U. S. (C. C. A. La. 1922) 280 F. 86, certiorari denied Kokenor v. U. S. (1922) 43 S. Ct. 92, 260 U. S. 730, 67 L. Ed. 485.

And in a prosecution under the National Prohibition Act (incorporated in this title), for removing liquor without a permit, the government need not prove want of a permit to make out a prima facie case; but if defendant should introduce substantial evidence that transportation was authorized by a permit, the government would then have to introduce evidence that no permit was issued, or that it was obtained by fraud, or that it did not apply to the act of transportation charged. U. S. v. Turner (D. C. Va. 1920) 266 F. 248.

20. Permit as evidence.—On application for interlocutory injunction to restrain confiscation and destruction of whisky

seized while in transit in interstate commerce, federal permits for its purchase and transportation were erroneously excluded because not accompanied by other documents, such as the applications therefor. W. A. Gaines & Co. v. Holmes (1922) 114 S. E. 327, 154 Ga. 344, 27 A. L. R. 98.

21. Offenses in general.—Sales to druggists by wholesale dealers. See note to section 23 of this title.

The provision of this section making an offense the removal of liquor without a permit did not impliedly repeal section 404 of Title 26, Internal Revenue, making transportation of untaxed spirits an offense; the two offenses embracing different elements, although emanating from the same sovereignty. U. S. v. Turner (D. C. Va. 1920) 266 F. 248.

Sections 281, 284, and 303–305 of Title 26, Internal Revenue, requiring distillers to register their stills, to give bond and to maintain signs on their distilleries and imposing penalties for their violation, and a prosecution thereunder held not barred by a prior conviction for violation of this section, by manufacturing liquor without a permit. U. S. v. Sacein Rouhana Farhat (D. C. Ohio, 1920) 269 F. 33.

Under this act the manufacture of intoxicating liquors without a permit, the failure to make a permanent record of such liquor, and the possession of property designed to manufacture liquor intended for use in violation of such act are separate offenses. Ex parte Poole (D. C. Mont. 1921) 273 F. 623.

A conviction in a state court for transporting liquor within the state in violation of a state statute held not a bar to a prosecution, based on the same transaction, for transporting liquor without obtaining a permit from the Commissioner of Internal Revenue, as required by this section as placing defendant twice in jeopardy. U. S. v. Regan (D. C. N. H. 1921) 273 F. 727.

Where delivery receipts for intoxicating liquor merely called for 100 cases out of the original owner's stock, and showed on their face that, before delivery could be made, a permit made out to the warehouseman must be procured, a sale was not complete until a sufficient permit was obtained, and owners of such receipts, who, under an agreement to sell the liquor for nonbeverage purposes, indorsed them in blank to the warehouseman, were not guilty of violating the National Prohibition Act (incorporated in this title) where a permit was had in due form, except that the warehouseman appeared thereon as vendor. Smulyan v. U. S. (C. C. A. Ohio, 1923) 293 F. 283.

Section 22 of this title making it a crime to manufacture, purchase for sale, sell, or transport liquor without making a permanent record in manner prescribed by statute, held applicable to sales by permittees only, in view of this section, prohibiting sales without permits. U. S. v. Katz (D. C. Pa. 1925) 5 F.(2d) 527, affirmed (1926) 46 S. Ct. 513, 271 U. S. 354, 70 L. Ed. 986.

In state statute prohibiting transporting of intoxicating liquor without permit, provisions that state need not allege and prove that accused did not possess permit are inseparable, and, former being unconstitutional, both are. State v. Webber (1926) 133 A. 738, 125 Me. 319.

Keeping in place other than that specified in permit is unlawful. Boone v. State (1923) 109 Ohio St. 1, 141 N. E. 841.

22. —— Jurisdiction.—State court has jurisdiction over prosecutions for transportation of liquor intended for interstate transportation, but not shipped on through bill of lading or under permit as required by Volstead Act (incorporated in this title); Reed Amendment, § 5 (omitted in part as superseded), having no application to such transportation. People v. Avery (1926) 211 N. W. 349, 236 Mich. 549.

23. —— Indictment.—Under this section, transportation of liquor, though for medicinal purposes, must be made under permit, and counts of indictment charging transportation without permit are not defective for failure to aver that transportation was for beverage purposes. Lewis v. U. S. (C. C. A. Fla. 1925) 4 F.(2d) 520.

When indictment charged a conspiracy by all defendants to defraud the United States through the unlawful issuance of permits to purchase liquor, to be accomplished through several groups, who were to carry out parts of the conspiracy, and that each defendant knew of the general conspiracy, the question whether the evidence will show such knowledge, or will show that the so-called general conspiracy was in fact the doing of things having similar unlawful purposes in view by separate groups, is of no concern on demurrer, but raises trial questions. U. S. v. McConnell (D. C. Pa. 1923) 285 F. 164.

Count of indictment for manufacturing for sale contrary to county liquor law was not subject to quashal for not negativing possibility of manufacture pursuant to license and authority of United States. Weller v. State (1926) 132 A. 624, 150 Md. 278.

24. —— Evidence.—Legal presumption is that drug store owner, having lawful permit to sell whisky, was innocent of unlawful sale or possession thereof. Krock v. U. S. (C. C. A. Mo. 1926) 12 F. (2d) 370; Johnson v. U. S. (C. C. A. Mo. 1926) 12 F.(2d) 374.

In prosecution of druggist for possession of liquor in violation of Volstead Act (incorporated in this title) and holding liquors for sale contrary to regulations and his permit, a single sale may be

enough to show that it was an instance of habitual practice, sufficient to justify finding that whole stock is held for illicit sale. Steckler v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 59.

25. —— Affirmance.—Conviction affirmed. Park v. U. S. (C. C. A. N. H. 1924) 294 F. 776.

26. Punishment for violation of section.—A defendant convicted for the first time of selling whisky in violation of this section, was held subject to a sentence of imprisonment under section 46 of this title. Dusold v. U. S. (C. C. A. Wis. 1921) 270 F. 574.

Conviction for unlawful manufacturing, possessing, and selling intoxicating liquor and maintenance of liquor nuisance in violation of this section and sections 4 and 12 of this title, held not objectionable as imposing double punishment; offenses being distinct. Leonard v. U. S. (C. C. A. Tenn. 1927) 18 F.(2d) 208.

§ 17. Physicians' prescriptions. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose. **(Oct. 28, 1919, c. 85, Title II, § 7, 41 Stat. 311.)**

Notes of Decisions

See, also, notes to section 18 of this title.

1. Validity.—This section as supplemented by section 18 of this title restricting amount of spirituous liquor which physician may prescribe, is not in excess of power conferred on Congress by Const. Amend. 18, § 2, nor violative of physician's fundamental right to untrammeled exercise of his best skill in the treatment of his patients, in view of Const. art. 1, § 8, and Amendment 18, but is clearly adapted to promote purpose of Eighteenth Amendment and appropriate enforcement thereof. Lambert v. Yellowley (N. Y. 1926) 47 S. Ct. 210, 272 U. S. 581, 71 L. Ed. ——, affirming (C. C. A. 1924) 4 F.(2d) 915, which reversed (D. C. 1923) 291 F. 640.

It is not violative of constitutional guaranties of life, liberty, and property. Lambert v. Yellowley (C. C. A. N. Y. 1925) 4 F.(2d) 915, reversing (D. C. 1923) 291 F. 640, and affirmed (1926) 47 S. Ct. 210, 272 U. S. 581, 71 L. Ed. ——.

State or United States may take away right to drink liquors which are intoxicating, and to do so effectively may take away right to drink certain liquors containing alcohol insufficient to intoxicate. Lambert v. Yellowley (C. C. A. N. Y. 1925) 4 F.(2d) 915, reversing (D. C. 1923) 291 F. 640, and affirmed (1926) 47 S. Ct. 210.

2. Municipal regulation of prescriptions.—A city ordinance forbidding the filling of prescriptions calling for more than eight ounces of alcoholic liquor, manifestly does not infringe any right of the pharmacist granted by the Eighteenth Amendment or the National Prohibition Act (incorporated in this title), and protected by the Fourteenth Amendment. Hixon v. Oakes (Cal. 1924) 265 U. S. 254, 44 S. Ct. 514, 68 L. Ed. 1005, dismissing writ of error to review In re Hixon (1923) 61 Cal. App. 200, 214 P. 677.

3. Criminal offenses—Forgery of prescriptions.—An indictment charging defendant with possession, with intent to utter as true, of false and forged writings purporting to be prescriptions issued

by various physicians, whose names were written thereon, for intoxicating liquor, under the provisions of the National Prohibition Act (incorporated in this title) and its accompanying regulations, held to charge an offense under section 72 of Title 18, Criminal Code and Criminal Procedure. U. S. v. Tynan (D. C. N. Y. 1923) 6 F.(2d) 668.

4. —— Instructions.—Where the only question in a prosecution for selling intoxicating liquors was whether defendant pharmacist's testimony that he produced the whisky in response to a prescription was true or false, an instruction that if a prescription was produced, and defendant was bona fide filling the prescription, he was not violating the law, is sufficient, and a requested charge relating to the doctor's signature on the prescription was immaterial, and was properly denied. Condello v. U. S. (C. C. A. N. Y. 1924) 297 F. 200.

§ 18. Kinds of liquor which may be prescribed; percentage of alcohol in; quantity permitted to be prescribed. Only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. But this provision shall not be construed to limit the sale of any article the manufacture of which is authorized under section 13 of this chapter. (Nov. 23, 1921, c. 134, § 2, 42 Stat. 222.)

Historical Note

This section is a part of section 2 of an Act entitled "An act supplemental to the National Prohibition Act [incorporated in this title]," cited in the credit to the text. See historical note to section 2 of this title.

Cross-References

The portions of the original text of this section omitted here are incorporated in sections 15, 20, and 56 of this title.

Notes of Decisions

1. Validity.—See, also, notes to section 17 of this title.

The provisions of this section and section 17 of this title limiting amount of liquor which physician may prescribe, are adapted to appropriate enforcement of Eighteenth Amendment and within the power of Congress. Lambert v. Yellowley (N. Y. 1926) 47 S. Ct. 210, 272 U. S. 581, 71 L. Ed. ——, affirming (C. C. A. 1924) 4 F.(2d) 915, which reversed (D. C. 1923) 291 F. 640.

They are not violative of the physician's fundamental right. Id.

Their provisions, limiting the quantity of liquor to be taken internally that may be prescribed by a physician for the same person within a period of ten days, apply only to "beverage" liquor, and as so limited are within the police powers conferred on Congress by the Eighteenth Amendment, and valid. Price v. Russell (D. C. Ohio, 1924) 296 F. 263.

The first sentence of this section which in effect prohibits physicians from prescribing intoxicating malt liquors for medicinal purposes is constitutional. James Everard's Breweries v. Day (N. Y. 1924) 265 U. S. 545, 44 S. Ct. 628, 68 L. Ed. 1174, wherein the court said:

"Under the regulations adopted by the Treasury Department after the passage of the National Prohibition Act [incorporated in this title] physicians obtaining permits were authorized to prescribe only distilled spirits, wines and certain alcoholic medicinal preparations. T. D. 2985. In October, 1921, pursuant to an opinion of the Attorney-General that the Commissioner might issue permits for the manufacture of beer and other intoxicating malt liquors, as well as whisky and vinous liquors, for medicinal purposes (32 Ops. Atty. Gen. 467), the regulations were amended so as to authorize the Commissioner to issue permits for the manufacture of intoxicating malt liquors for medicinal purposes, and to permit physicians to prescribe them. T. D. 3239.

"In November Congress passed the Supplemental Act now in question, containing in section 2 [incorporated in part in this

section], as has been stated, the provision that 'only spirituous and vinous liquors may be prescribed for medicinal purposes,' and that all prescriptions for any other liquor and permits therefor shall be void. The direct effect of this provision is to prohibit physicians from prescribing intoxicating malt liquors for medicinal purposes, and the Commissioner from issuing permits authorizing such prescriptions. This section also limits prescriptions for vinous liquor to one fourth of a gallon, containing not more than 24 per centum of alcohol, and provides that the vinous and spirituous liquor prescribed for any person within any period of ten days shall not contain more than one-half pint of alcohol. * * * The contention that this provision of the Supplemental Act is unconstitutional is based primarily upon the grounds: That the 18th Amendment merely delegates to Congress the authority to prohibit the traffic in intoxicating liquors for beverage purposes, and the control of the traffic in such liquors for nonbeverage purposes is reserved to the several states; that while Congress possesses the incidental power to regulate the traffic in intoxicating liquors for nonbeverage purposes so far as is reasonably necessary to make effective the prohibition of the traffic in such liquors for beverage purposes, this incidental power is limited to reasonable regulation, and does not extend to complete prohibition; and that the prohibition of prescriptions for the use of intoxicating malt liquors for medicinal purposes is neither an appropriate nor reasonable exercise of the power conferred upon Congress by the Amendment, and infringes upon the legislative power of the states in matters affecting the public health.

"It is clear that if the act is within the authority delegated to Congress by the 18th Amendment, its validity is not impaired by reason of any power reserved to the states. The words 'concurrent power,' as used in the 2d section of the Amendment, 'do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them;' and the power confided to Congress, while not exclusive, 'is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.' National Prohibition Cases (Rhode Island v. Palmer) (R. I. 1920) 253 U. S. 350, 387, 64 L. Ed. 946, 979, 40 S. Ct. 486, 588. And if the act is within the power confided to Congress, the 10th Amendment, by its very terms, has no application, since it only reserves to the states 'powers not delegated to the United States by the Constitution.' See M'Culloch v. Maryland (Md. 1819) 4 Wheat. 316, 406, 4 L. Ed. 579, 601; Lottery Case (Champion v. Ames) (1903) 188 U. S. 321, 357, 47 L. Ed. 492, 501, 23 S. Ct. 321, 13 Am. Crim. Rep. 561.

"We come, then, to the question whether this act is within the power conferred upon Congress by the 18th Amendment. By its terms the Amendment prohibits the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, and grants to Congress the power to enforce this prohibition 'by appropriate legislation.' Its purpose is to suppress the entire traffic in intoxicating liquor as a beverage. See Grogan v. Hiram Walker & Sons (Mich. 1922) 259 U. S. 80, 89, 66 L. Ed. 836, 839, 22 A. L. R. 1116, 42 S. Ct. 423. And it must be respected and given effect in the same manner as other provisions of the Constitution. National Prohibition Cases (Rhode Island v. Palmer) (R. I. 1920) 253 U. S. 350, 386, 64 L. Ed. 946, 978, 40 S. Ct. 486, 588."

After a considerable discussion of the question raised, the court concludes in language as follows:

"We are unable to say that the provision of the Supplemental Act is an arbitrary and unreasonable exercise of the power vested in Congress by the 18th Amendment, or that it is not 'appropriate legislation' for its enforcement." To the same effect, see Falstaff Corporation v. Allen (D. C. Mo. 1922) 278 F. 643; Piel Bros. v. Day (D. C. N. Y. 1922) 278 F. 223.

2. Regulations as to quantity of liquor.—Except in the case of spirituous liquor, the quantity of liquor that may be prescribed by a physician in a given emergency or during a given period of time cannot be limited by regulation, but a regulation may limit the quantity of liquor of any kind which may be called for by a single prescription. (1921) 32 Op. Atty. Gen. 467.

3. State laws.—In Ex parte Hixson (1923) 214 P. 677, 61 Cal. App. 200, the court said:

"Petitioner's final point is based upon a recent decision of the Florida Supreme Court—Hall v. Moran (1921) 81 Fla. 706, 89 So. 104. Because the Volstead Act [incorporated in this title] expressly permits physicians to prescribe for any one person one pint of spirituous liquor in any period of ten days, petitioner claims that there is thereby granted by Congress to citizens of the United States a 'right' or a 'privilege' which is protected by the Fourteenth Amendment, and that no state or political subdivision thereof may abridge such right or privilege. The decision of the Florida Supreme Court in Hall v. Moran, supra, seems to lend support to this proposition. We are unable to agree with the reasoning of that case. * * *

"The vice of this argument, as we view it, lies in its assumption that Congress

may grant the 'right' to possess intoxicating liquors. The Eighteenth Amendment—the sole source of the power of Congress to deal directly with the liquor traffic—is a prohibitory, not a permissive, amendment. It declares that 'the manufacture, sale, or transportation of intoxicating liquors * * * for beverage purposes is * * * prohibited'; and by the second section of the amendment Congress is given power to enforce such national prohibition by appropriate legislation. There is here no grant to Congress of the power to create or confer any 'right' to possess intoxicating liquors. The sole power granted to Congress is the power to enforce the federal prohibition contemplated by the amendment. In the exercise of its power to prohibit the manufacture, sale, and transportation of intoxicating beverage, Congress unquestionably may regulate the possession of such liquors for private use, since the regulation of such possession has a substantial relation to the enforcement of the prohibition aimed at by the amendment. Page v. United States, supra. But its power so to regulate the possession of liquors is but an incident to its power to prohibit. Its power to regulate possession for private use exists solely because such regulation of possession is an appropriate means whereby the expressly granted power to prohibit the manufacture, sale, and transportation may be effectively carried into execution. So far from being the grant of a right, the congressional regulation of possession is a limitation upon right or privilege. It is a limitation upon that privilege of possessing liquors which, but for the federal regulation, would be unlimited, save in so far as it might be limited by state legislation. It is absurd to say that Congress, merely because it has the power to regulate the possession of intoxicating beverages as an incident to its expressly granted power to prohibit their manufacture, sale, and transportation, confers a 'right' when, by appropriate regulatory provisions, it places limitations upon the privilege of possessing liquors."

§ 19. Prescription blanks. The commissioner shall cause to be printed blanks for the prescriptions herein required, and he shall furnish the same, free of cost, to physicians holding permits to prescribe. The prescription blanks shall be printed in book form and shall be numbered consecutively from 1 to 100, and each book shall be given a number, and the stubs in each book shall carry the same numbers as and be copies of the prescriptions. The books containing such stubs shall be returned to the commissioner when the prescription blanks have been used, or sooner, if directed by the commissioner. All unused, mutilated, or defaced blanks shall be returned with the book. No physician shall prescribe and no pharmacist shall fill any prescription for liquor except on blanks so provided, except in cases of emergency, in which event a record and report shall be made and kept as in other cases. (Oct. 28, 1919, c. 85, Title II, § 8, 41 Stat. 311.)

§ 20. Number of blanks issued to physician within given period. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him. (Nov. 23, 1921, c. 134, § 2, 42 Stat. 222.)

Cross-References

The portions of the original text of this section omitted here, are incorporated in sections 15, 18, and 56 of this title.

Notes of Decisions

See, also, notes to sections 17 and 18 of this title.

1. Validity.—In U. S. v. Freund (D. C. Mont. 1923) 290 F. 411, it was held that the provision limiting the number of prescriptions a physician could write was unreasonable and invalid. This is probably overruled by decisions of the Supreme Court cited in the notes to sections 15 and 18 of this title.

§ 21. Violations of law by permittee; citation; hearing; revocation of permit. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this chapter,* or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named not more than thirty and not less than fifteen days from the date of service upon such permittee of a copy of the citation, which citation shall be accompanied by a copy of such complaint, or in the event that the proceedings be initiated by the commissioner with a statement of the facts constituting the violation charged, at which time a hearing shall be had unless continued for cause. Such hearings shall be held within the judicial district and within fifty miles of the place where the offense is alleged to have occurred, unless the parties agree on another place. If it be found that such person has been guilty of willfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this chapter,* such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. Should the permit be revoked by the commissioner, the permittee may have a review of his decision before a court of equity in the manner provided in section 14 hereof. During the pendency of such action such permit shall be temporarily revoked. (Oct. 28, 1919, c. 85, Title II, § 9, 41 Stat. 311.)

* See the starred note to section 11 of this title.

Notes of Decisions

1. Construction in general.
2. Revocation of permit in general.
3. Authority to revoke permits.
4. Grounds for revoking permit.
5. —— Evidence.
6. Proceedings to revoke—In general.
7. Hearing.
8. Rights of permittees pending proceedings to revoke.
9. Review of proceeding to revoke—In general.
10. —— Parties.
11. —— Pleading.
12. —— Evidence.
13. Rights of permittees in absence of proceedings to revoke.

1. Construction in general.—The word "shall," as used in this section, with respect to issuance of order citing person to appear, and in the words "shall be revoked" is mandatory and not discretionary. (1921) 32 Op. Atty. Gen. 401.

2. Revocation of permit in general.—A liquor permit, the rights in respect of which are fixed by this section and sections 14 and 16 of this title, which entitles permittee to a review by a court of equity of the action of the Commissioner of Internal Revenue, is not revoked as a punishment for a crime, but to enforce conditions under which permit was granted. U. S. Industrial Alcohol Co. v. Blair (D. C. Pa. 1925) 6 F.(2d) 658.

3. Authority to revoke permits.—Under this section, and section 14 of this title, providing for a hearing by the holder of a revoked permit to review the action of the commissioner, who by § 4, cl. 3 of this title is the Commissioner of Internal Revenue, and Regulation 60, § 16, delegating this power to the federal Prohibition Commissioner, a federal prohibition director has no power to revoke a liquor permit. Bay State Wholesale Drug Co. v. Potter (D. C. Mass. 1922) 277 F. 529.

A like holding under this section and section 4, paragraph 7, of this title was made in New Jersey Wholesale Drug Co. v. Brown (D. C. N. J. 1922) 289 F. 108.

But person, who for two years, under color of appointment by federal prohibition director, issued and served citations and revoked permits, was held de facto officer, and his acts valid in Troy Ice & Beverage Co. v. U. S. (C. C. A. Ill. 1926) 15 F.(2d) 609.

4. Grounds for revoking permit.—Under this section, a permit should not be revoked where permittee has acted in good faith but erroneously failed to conform to the act. McGill v. Mellon (D. C. Mass. 1925) 5 F.(2d) 262.

Failure, not in bad faith, of employees of manufacturers of toilet preparations and perfumes to conform to instructions for removal of labels on barrels which had contained denatured alcohol bought and used by manufacturers in perfumery business, was held not ground for revocation of manufacturers' permits under this section. Id.

A permittee, who receives special denatured alcohol from the government for purposes of manufacturing disinfectant, and who diverts alcohol, and seeks to cover up diversion by fictitious sales of disinfectant, is not acting in good faith in conforming with National Prohibition Act (incorporated in this title), and regulations, within this section, providing for revocation of permit on permittee's failure in good faith to conform to provisions of act. Hoell v. Mellon (D. C. N. Y. 1925) 4 F.(2d) 859.

Under this section, providing for revocation of liquor permit where permittee has not in good faith conformed to provisions of act, the good faith must be absent in some act of permittee, so that such act, viewed in the light of surrounding circumstances, raises the fair inference of lack of good faith, an act of omission being as much an act within the statute as an act of commission. Id.

Druggist's permit to dispense intoxicants should not be revoked for isolated infractions of regulations by employees without knowledge or consent of responsible head. Shreveport Drug Co. v. Jackson (D. C. La. 1924) 2 F.(2d) 65.

It is the duty of one to whom a permit is granted under National Prohibition Act, tit. 2 (incorporated in this title), to see that it is not used for violation of the act, and a failure to do so will warrant a revocation of the permit, under the provision of this section authorizing such revocation of the permittee "has not in good faith conformed to the provisions of this act." Schnitzler v. Yellowley (D. C. N. Y. 1923) 290 F. 849, wherein it was said:

"It was the omission to act, not the commission of acts, with which the plaintiff was charged. She had no right after receiving the permit to allow the conditions to prevail which are shown by her own testimony, and if such conditions were allowed to prevail, then the only way by which enforcement of the law could be compelled would be to deprive her of the opportunity of violating the law, and instead of the action of the Commissioner being arbitrary, it was the only course open to him under the conditions, the existence of which were admitted by the plaintiff."

5. —— Evidence.—Evidence that druggist knew or had reason to believe that whisky prescriptions which he filled were for beverage rather than medical purposes held to authorize forfeiture of his permit under this section, and regulations of the commissioner under subdivision 7 of section 4 of this title. O'Rourke v. Parker (D. C. Mass. 1926) 14 F.(2d) 191.

6. Proceedings to revoke—In general.—Revocation of permit to manufacture denatured alcohol, under regulation that all permits should expire on December 31, 1925, was held improper, without giving 15 days' notice and serving statement of facts on which revocation was based. Higgins v. Foster (C. C. A. N. Y. 1926) 12 F.(2d) 646.

Order revoking permit to operate denaturing plant was held not void because not rendered 10 days after hearing. Herman Chemical Co. v. Mellon (1926) 10 F. (2d) 887, 56 App. D. C. 92.

Proceeding to cancel permit for denaturing plant was held properly prosecuted under this section, rather than under section 14 of this title. Id.

That proceeding under this section, questioning permittee's use of denatured alcohol obtained by him and looking to cancellation of that permit, was instituted in district other than that in which permittee had right to insist on hearing, is not ground for dismissal before hearing. Blackman v. Mellon (D. C. N. Y. 1924) 5 F.(2d) 987.

A permittee, who appears in answer to a citation issued under this section to show cause why his permit should not be revoked, and without objection proceeds with the hearing, cannot object later to its regularity. Schnitzler v. Yellowley (D. C. N. Y. 1923) 290 F. 849.

So failure to object to the sufficiency of the citation to a hearing to revoke a druggist's permit, at the hearing, amounts to a waiver of the objection and it cannot be later made in an action to compel the issuance of the permit. Goldberg v. Yellowley (D. C. N. Y. 1923) 290 F. 389.

And where a druggist, in proceedings to revoke his permit, failed to object to the sufficiency of the citation, its insufficiency cannot be used as a basis for granting a preliminary injunction against enforcing the order of revocation. Gray v. Yellowley (D. C. N. Y. 1923) 290 F. 400.

The furnishing, with a citation to revoke a permit to withdraw liquor for nonbeverage purposes, of a copy of the agent's report to the local prohibition director's office, is a sufficient statement of facts to comply with the requirement of this section, that a statement of the facts constituting the violation charged shall accompany the citation, if the proceedings be initiated for the commissioner. Fiedler v. Moss (D. C. N. J. 1923) 287 F. 934.

7. Hearing.—This section does not authorize the revocation of a permit before

the hearing of charges against the permittee. New Jersey Wholesale Drug Co. v. Brown (D. C. N. J. 1922) 289 F. 108.

But hearing as in case of cancellation to permit is not required, where permit expires by lapse of time. Chicago Grain Products Co. v. Mellon (C. C. A. Ill. 1926) 14 F.(2d) 362.

And tender of hearing, on trial of bill for injunction and bill of review, after denial of permit to operate industrial alcohol plant, has been held sufficient, whether required by this section or not. Id.

Four hearings on application of a permittee for renewal of his permit, in which he participated, and as a result of which his application was denied and his original permit revoked, were held in effect revocation proceedings. Cywan v. Blair (D. C. Ill. 1926) 16 F.(2d) 279.

8. Rights of permittees pending proceedings to revoke.—Under this section, basic permit to use specially denatured alcohol is not temporarily revoked by pendency of proceeding before Commissioner of Internal Revenue to revoke permit. Wilson v. Bowers (D. C. N. Y. 1924) 14 F.(2d) 976.

One who holds a permit for the withdrawal of intoxicating liquor for nonbeverage purposes cannot be denied the right to withdraw liquors after a citation for revocation of the permit has been served upon him, but before the hearing which would be to permit him to be condemned unheard; the provision in this section, that during the pendency of an action the permit shall be temporarily revoked, applying to the action brought by the permittee for a review of the decision of the Commissioner after hearing by him revoking the permit. Fiedler v. Moss (D. C. N. J. 1923) 287 F. 934.

No official has a right to exercise authority to promulgate rules and regulations, except as they have their basis in original law, and therefore the treasury decision denying the right of a permittee to withdraw liquor while proceedings for revocation of the permit are pending does not justify refusal of such withdrawal. Id.

Under the provision of this section, that pending suit for review of a decision revoking a permit, such permit shall be temporarily revoked, the effect of a temporary injunction continuing the permit in force is not to preserve, but to disturb, the status quo, and it should not be granted where the sworn answer overcomes the equities alleged in the bill. Cywan v. Blair (D. C. Ill. 1926) 16 F.(2d) 279.

One holding a permit to use specially denatured alcohol in a manufacture was held entitled to an injunction to restrain the Commissioner from refusing him withdrawal permits for alcohol prior to hearing on a citation to show cause why his basic permit should not be revoked. Carnioid v. Blair (D. C. N. Y. 1926) 15 F.(2d) 56.

Permittee, pending proceeding to revoke basic permit to operate denaturing plant, held not entitled to injunction against denial of withdrawal permits. Olivett Distributing Co. v. Bowers (D. C. N. Y. 1926) 14 F.(2d) 318.

In a suit to review action of the commissioner in revoking a permit as provided in this section, the court, even if it has the power, will not enjoin enforcement of the order of temporary revocation, if the circumstances cast doubt on the good faith of complainant in complying with the law under the permit. Schnitzler v. Yellowley (D. C. N. Y. 1923) 288 F. 84.

In a suit in equity, pursuant to this section and section 14 of this title to review the action of prohibition enforcement officers in revoking a retail druggist's permit to sell liquors, a preliminary injunction to restrain enforcement of the order will be denied, where the answer denied the material allegations of the bill of complaint. In that case where the defendant was charged with dispensing intoxicating liquors on forged prescriptions, and that he had not used due diligence to ascertain their authenticity, it was held, in view of the evidence taken on the hearing before the prohibition agent, that a preliminary injunction should not be granted to restrain the enforcement of the order revoking the permit, which would give to the complainant relief as great as he would obtain if successful on a trial, especially where it was not shown that the enforcement officers were acting in bad faith. Gray v. Yellowley (D. C. N. Y. 1923) 290 F. 400.

9. Review of proceeding to revoke—In general.—Under this section and section 14 of this title a manufacturer under a permit, whose permit has been revoked or a renewal thereof denied, has the right to have such action reviewed by a court of equity, both as to the law and facts. Vollmer Beverage Co. v. Blair (D. C. Pa 1924) 2 F.(2d) 469.

The proceeding for review of action of Commissioner of Internal Revenue in revoking liquor permit, is a proceeding in the nature of a bill of review, though trial in such proceedings is de novo. Hoell v. Mellon (D. C. N. Y. 1925) 4 F.(2d) 859.

The scope of the suit is for most practical purposes, a trial de novo. O'Sullivan v. Potter (D. C. Mass. 1923) 290 F. 844. To the same effect see Schnitzler v. Yellowley (D. C. N. Y. 1923) 290 F. 849.

A trial of the case and not a trial of the administrative trial is required. McGill v. Mellon (D. C. Mass. 1925) 5 F.(2d) 262.

The hearing is de novo, and sufficiency of citation cannot arise. Velvo Chemical

Laboratories v. Mellon (D. C. N. Y. 1926) 13 F.(2d) 1019.

The question as to whether the Commissioner committed error at law is whether there was any legal evidence before the Commissioner on which he could base a decision that plaintiff's permit should be revoked. Hoell v. Mellon (D. C. N. Y. 1925) 4 F.(2d) 859.

The investigation may cover wide latitude; but it is not duty of court to administer law, except where there appears clear abuse of powers by Commissioner or his agents. Shreveport Drug Co. v. Jackson (D. C. La. 1924) 2 F.(2d) 64.

The court should take record as made up by Commissioner, and if there appears therein arbitrary action on his part, or if permittee through no fault or laches of his own failed to present his full case, relief may be afforded. Id.

Action to review revocation by Commissioner of Internal Revenue of liquor permit, under this section and section 14 of this title should be commenced within reasonable time after Commissioner's decision. Hoell v. Mellon (D. C. N. Y. 1925) 4 F.(2d) 859.

10. —— Parties.—In a suit in equity brought under this section to review the revocation of a permit it has been held that the Commissioner of Internal Revenue and the prohibition commissioner, both of Washington, are not necessary parties. O'Sullivan v. Potter (D. C. Mass. 1923) 290 F. 844.

But in another district it has been held that the Commissioner of Internal Revenue is necessary party to proceeding in equity, under this section, to review order of Prohibition Director revoking permit granted under section 16 of this title. Dami v. Canfield (D. C. N. Y. 1925) 5 F. (2d) 533.

11. —— Pleading.—In equitable proceeding against government to reinstate permits for use of alcohol for manufacturing purposes under this section and section 14 of this title, the government should plead clearly and specifically the derelictions on which it relies to justify and sustain the revocation. McGill v. Mellon (D. C. Mass. 1925) 5 F.(2d) 262.

12. —— Evidence.—In action under this section and section 14 of this title, to review revocation of liquor permit by Commissioner of Internal Revenue, there is no presumption that permittee falsified books or otherwise acted in bad faith. Hoell v. Mellon (D. C. N. Y. 1925) 4 F.(2d) 859.

In action under this section and section 14 of this title, to review revocation of liquor permit by Commissioner of Internal Revenue, evidence held insufficient to sustain finding of Commissioner that plaintiff, to whom permit had been issued for liquor for use in manufacturing disinfectant, diverted alcohol and covered up such diversion by fictitious sales of disinfectant. Id.

13. Rights of permittees in absence of proceedings to revoke.—Permittee to manufacture toilet articles, having incidental permit to use denatured alcohol in addition to statutory manufacturing permit, was held entitled to injunction against refusal of withdrawal permits, so long as basic permit stood unrevoked and no revocation proceeding under this section was instituted. Rock v. Blair (D. C. N. Y. 1926) 13 F.(2d) 1004.

Liquor lawfully in the possession of a druggist in accordance with his permit cannot be seized under a search warrant issued on the charge of making unlawful sales. In re Alpern (D. C. N. Y. 1922) 280 F. 432, wherein it was said: "It will be observed that the statute in plain and unambiguous terms prescribed the manner in which a permit to possess liquor by a permittee may be revoked. No proceedings to revoke have been begun against the petitioners. In the circumstances the possession by them of the intoxicating liquor seized by the prohibition agent was not unlawful and as to such liquor there was insufficient ground for issuing a search warrant or making a seizure of liquor thereunder."

§ 22. Record of manufacture, purchase, sale, or transportation of liquor. No person shall manufacture, purchase for sale, sell, or transport any liquor without making at the time a permanent record thereof showing in detail the amount and kind of liquor manufactured, purchased, sold, or transported, together with the names and addresses of the persons to whom sold, in case of sale, and the consignor and consignee in case of transportation, and the time and place of such manufacture, sale, or transportation. The commissioner may prescribe the form of such record, which shall at all times be open to inspection as in this chapter provided. (Oct. 28, 1919, c. 85, Title II, § 10, 41 Stat. 312.)

Notes of Decisions

1. Sales to which applicable.—One unlawfully selling intoxicating liquor is not punishable for failure to keep record of sales, such statutory requirement being

applicable only to permittees. U. S. v. Katz (Pa. 1926) 46 S. Ct. 513, 271 U. S. 354, 70 L. Ed. 986, affirming (D. C. 1925) 5 F.(2d) 527.

2. Inspection of records.—The right of prohibition agents under this section, section 51 of this title, and section 329 of Title 26, Internal Revenue, to inspect records of wholesale liquor dealers, gave them no right to make a forcible entry for the purpose of such inspection or to seize such records. U. S. v. Kraus (D. C. N. Y. 1921) 270 F. 578.

3. Indictment.—Indictments charging conspiracy to sell liquor, without making permanent record, required by this section, held defective for failure to allege that seller had a permit to sell liquor; such allegation being a matter of description and not a defensive negative averment. U. S. v. Katz (D. C. Pa. 1925) 5 F. (2d) 527, affirmed (1926) 46 S. Ct. 513, 271 U. S. 354, 70 L. Ed. 986.

Consolidation for trial of indictments for conspiracy to transport liquor in violation of this section, and unlawful possession and sale thereof, held within court's discretion. Goldberg v. U. S. (C. C. A. Ga. 1924) 297 F. 98.

4. Records as evidence.—Admission in evidence of account ledger kept by defendants charged with conspiracy to violate Prohibition Law (incorporated in this title), which showed purchases and sales of liquors and payments of money to police officer, was held not violation of Const. Amend. 5, as compelling defendants to be witnesses against themselves, particularly in view of this section, requiring record of manufacture, purchase, or sale of liquor, as one who records his affairs in a book subject to inspection under statute cannot complain of consequent invasion of his privacy. Marron v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 251.

§ 23. Copies of permits to be kept by manufacturers and wholesalers; sales only at wholesale. All manufacturers and wholesale or retail druggists shall keep as a part of the records required of them a copy of all permits to purchase on which a sale of any liquor is made, and no manufacturer or wholesale druggist shall sell or otherwise dispose of any liquor except at wholesale and only to persons having permits to purchase in such quantities. (Oct. 28, 1919, c. 85, Title II, § 11, 41 Stat. 312.)

Notes of Decisions

1. Sale at wholesale.—Under this section, and sections 12 and 16 of this title, manufacturers, and wholesale druggists only are authorized to sell liquor at wholesale; and a jobber is not entitled to a permit to withdraw whisky from bond for sale to druggists. Small Grain Distilling & Drug Co. v. Hamilton (C. C. A. Ky. 1921) 276 F. 544.

§ 24. Labels on containers. All persons manufacturing liquor for sale under the provisions of this chapter shall securely and permanently attach to every container thereof, as the same is manufactured, a label stating name of manufacturer, kind and quantity of liquor contained therein, and the date of its manufacture, together with the number of the permit authorizing the manufacture thereof; and all persons possessing such liquor in wholesale quantities shall securely keep and maintain such label thereon; and all persons selling at wholesale shall attach to every package of liquor, when sold, a label setting forth the kind and quantity of liquor contained therein, by whom manufactured, the date of sale, and the person to whom sold; which label shall likewise be kept and maintained thereon until the liquor is used for the purpose for which such sale was authorized. (Oct. 28, 1919, c. 85, Title II, § 12, 41 Stat. 312.)

Notes of Decisions

1. Repeal of prior law.—Section 417 of Title 26, Internal Revenue, providing a punishment for forging and counterfeiting United States bottling in bond strip stamps, was not repealed by the Eighteenth Amendment and this section, in view of the fact that the National Prohibition Act, (incorporated in this title) did not expressly repeal taxation of distilled spirits in bond or the practice of

bottling in bond, and that section 52 of this title declares that all inconsistent provisions of law are repealed only to extent of such inconsistency, that the regulations therein prescribed shall be construed in addition to existing laws, and that the act should not relieve any one from paying any taxes or charges imposed on the manufacture or traffic in such liquor. Skilken v. U. S. (C. C. A. Ohio, 1923) 293 F. 923, affirming U. S. v. Skilken (D. C. 1923) 293 F. 916.

§ 25. Shipments of liquor; records of carriers; delivery; verification of copies of permits. It shall be the duty of every carrier to make a record at the place of shipment of the receipt of any liquor transported, and he shall deliver liquor only to persons who present to the carrier a verified copy of a permit to purchase which shall be made a part of the carrier's permanent record at the office from which delivery is made.

The agent of the common carrier is hereby authorized to administer the oath to the consignee in verification of the copy of the permit presented, who, if not personally known to the agent, shall be identified before the delivery of the liquor to him. The name and address of the person identifying the consignee shall be included in the record. (Oct. 28, 1919, c. 85, Title II, § 13, 41 Stat. 312.)

§ 26. Notice to carrier of nature of shipments; information on packages. It shall be unlawful for a person to use or induce any carrier, or any agent or employee thereof, to carry or ship any package or receptacle containing liquor without notifying the carrier of the true nature and character of the shipment. No carrier shall transport nor shall any person receive liquor from a carrier unless there appears on the outside of the package containing such liquor the following information:

Name and address of the consignor or seller, name and address of the consignee, kind and quantity of liquor contained therein, and number of the permit to purchase or ship the same, together with the name and address of the person using the permit. (Oct. 28, 1919, c. 85, Title II, § 14, 41 Stat. 312.)

§ 27. Consigning, shipping, transporting, delivering, or receiving packages with false statements thereon. It shall be unlawful for any consignee to accept or receive any package containing any liquor upon which appears a statement known to him to be false, or for any carrier or other person to consign, ship, transport, or deliver any such package, knowing such statement to be false. (Oct. 28, 1919, c. 85, Title II, § 15, 41 Stat. 313.)

§ 28. Orders to carrier for delivery to persons not actual bona fide consignees. It shall be unlawful to give to any carrier or any officer, agent, or person acting or assuming to act for such carrier an order requiring the delivery to any person of any liquor or package containing liquor consigned to, or purporting or claimed to be consigned to a person, when the purpose of the order is to enable any person not an actual bona fide consignee to obtain such liquor. (Oct. 28, 1919, c. 85, Title II, § 16, 41 Stat. 313.)

Notes of Decisions

1. Indictment.—An indictment charging that defendants induced a carrier to take a shipment of liquor for delivery to a named consignee in New York, when the

purpose was to have delivery made at a different place to one not the consignee, was held to charge an offense under this section. Baron v. U. S. (C. C. A. Ohio, 1923) 286 F. 822, certiorari denied (1923) 43 S. Ct. 524, 262 U. S. 749, 67 L. Ed. 1213.

§ 29. Advertising liquor or manufacture, sale, or keeping for sale thereof; exceptions. It shall be unlawful to advertise anywhere, or by any means or method, liquor, or the manufacture, sale, keeping for sale or furnishing of the same, or where, how, from whom, or at what price the same may be obtained. No one shall permit any sign or billboard containing such advertisement to remain upon one's premises. But nothing herein shall prohibit manufacturers and wholesale druggists holding permits to sell liquor from furnishing price lists, with description of liquor for sale, to persons permitted to purchase liquor, or from advertising alcohol in business publications or trade journals circulating generally among manufacturers of lawful alcoholic perfumes, toilet preparations, flavoring extracts, medicinal preparations, and like articles: *Provided, however,* That nothing in this chapter* shall apply to newspapers published in foreign countries when mailed to this country. (Oct. 28, 1919, c. 85, Title II, § 17, 41 Stat. 313.)

* "or section 341 of Title 18" should be inserted.

Historical Note

Prior to its incorporation into the Code, the proviso contained in this section read as follows: "Provided, however, That nothing in this Act or in the Act making appropriations for the Post Office Department, approved March 3, 1917 (Thirty-ninth Statutes at Large, Part 1, page 1058, et seq.), shall apply to newspapers published in foreign countries when mailed to this country." The pertinent provisions of the Act of March 3, 1917, referred to, were contained in section 5, known as the "Reed Amendment." A part of that section was omitted from the Code as superseded by the National Prohibition Act, and a part was incorporated into Title 18, Criminal Code and Criminal Procedure, as section 341.

§ 30. Advertising, manufacture, or sale of utensils, apparatus, ingredients or formulæ for manufacture of liquor. It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor. (Oct. 28, 1919, c. 85, Title II, § 18, 41 Stat. 313.)

Notes of Decisions

1. Repeals.—Sections 281 and 306 of Title 26, Internal Revenue, the internal revenue laws relating to registration, etc., of stills, were held not repealed by this act. Ex parte Lawrence (D. C. Mont. 1921) 273 F. 876, appeal dismissed Bechtold v. U. S. (C. C. A. 1921) 276 F. 816.

2. Offenses in general.—One who takes order in state to be filled by concern residing in another state for artificial fruit juice containing no trace of alcohol when delivered is not guilty of engaging in liquor traffic, under Laws 1923, c. 268, §§ 1, 1B or 2G, in view of Laws 1921, c. 97, §§ 3, 4, which is equivalent to this section, regardless of exceptions of Act Aug. 8, 1890, c. 728, 26 Stat. 313 (omitted as superseded), making original packages of intoxicating liquors transported into state subject to its police powers. State v. Daniels (1925) 206 N. W. 78, 53 N. D. 403.

Defendants, conspiring to sell denatured alcohol for conversion into beverage alcohol, were held guilty of conspiracy to violate National Prohibition Act (incorporated in this title), in view of this section. Jones v. U. S. (C. C. A. Md. 1926) 11 F. (2d) 98, writ of error dismissed (C. C. A. 1926) 12 F.(2d) 708, and certiorari denied (1926) 46 S. Ct. 633, 271 U. S. 682, 70 L. Ed. 1149.

Assuming that section 39 of this title, prohibiting the possession of property designed for the manufacture of liquor intended for unlawful use, includes such possession for purpose of sale, there could

be no conviction on a count under that section, and also on a count under this section, relative to possession of utensils, etc., for sale, where the evidence showed conclusively that possession was for purpose of sale only, and not for defendant's own use in manufacturing liquors Rossman v. U. S. (C. C. A. Ohio, 1922) 280 F. 950.

3. Intent.—This section does not outlaw malt extract preparations, syrups, hops, and fruit juices, such as designated in Internal Revenue Regulation 60, except as they are advertised, designed, or intended for use in manufacture of intoxicants; and hence such regulation, making sale thereof unlawful, is not warranted by law, and a permit to a manufacturer, based on such regulation and not authorizing the manufacturing for sale or selling of such preparations, would not make sale thereof violation of permit. Stroh Products Co. v. Davis (D. C. Mich. 1925) 8 F. (2d) 773.

Under this section, making it unlawful to advertise, manufacture, sell, or possess for sale any contrivance, preparation, etc., intended for use in the unlawful manufacture of intoxicating liquor, the intent referred to is that of the seller alone. Weinstein v. U. S. (C. C. A. Mass. 1923) 293 F. 388.

Under this section, the act of manufacturing a vessel capable of being used as part of a still must be coupled with the specific intent to do the wrong denounced in the statute, before defendant is guilty. Nosowitz v. U. S. (C. C. A. N. Y. 1922) 282 F. 575.

4. Seizures.—Under this section and section 39 of this title, making it unlawful to sell or possess for sale any preparation designed or intended, or any property designed for the manufacture of liquor intended for use in violation of the act, and providing that search warrant may issue as provided in chapter 18 of Title 18, Criminal Code and Criminal Procedure, which contains a complete code of procedure for the allowance and execution of search warrants, the procedure prescribed must be followed for the seizure of the property used in violation of the National Prohibition Act (incorporated in this title), and it cannot be seized under a common-law libel in rem, since the Prohibition Act is in derogation of common-law rights of citizens, and the specific procedure provided for its enforcement must therefore be regarded as exclusive. U. S. v. Franzione (1923) 286 F. 769, 52 App. D. C. 307.

5. Indictment.—Under this section, indictment charging possessing for sale and sales of substances and a formula "designed or intended for use in the unlawful manufacture" of intoxicating liquor was held to sufficiently allege defendant intended things sold should be used in forbidden way. Hammerle v. U. S. (C. C. A. Ky. 1925) 6 F.(2d) 144.

Indictment charging conspiracy with person unknown held not at fatal variance with proof showing one known person was unnamed. Jones v. U. S. (C. C. A. Md. 1926) 11 F.(2d) 98, writ of error dismissed (C. C. A. 1926) 12 F.(2d) 708, and certiorari denied (1926) 46 S. Ct. 633, 271 U. S. 682, 70 L. Ed. 1149.

6. Evidence.—Where an indictment in one count charged the possession of certain property designed for the manufacture of intoxicating liquors in violation of the National Prohibition Act (incorporated in this title), and in a second count the possession for sale of a certain utensil designed and intended for the same purpose, with the further designation of the property and utensil as "a still and distilling apparatus," evidence that the defendant was in possession of a fifteen-gallon copper pot or utensil and a coil of copper tubing or worm, being the two most important parts of a still, was sufficient to show the possession of "distilling apparatus," as this phrase cannot be limited to a completed still, fully equipped and ready for operation. Rossman v. U. S. (C. C. A. Ohio, 1922) 280 F. 950.

It was the duty of the jury in determining whether one accused of having in his possession and for sale property and utensils designed for the manufacture of intoxicating liquor in violation of the provisions of this section, where the defense insisted that the utensils were not a completed still and might have been used for other and lawful purposes, "to take into consideration the evidence offered by the government that these prohibition agents informed the plaintiff in error that they wanted to buy a still for the purpose of making corn whisky; that he told them he had a still for sale, and did sell them this copper utensil and copper worm as a still to be used for the purposes named; and that in connection with such sale he took the purchasers and the property purchased by them to his codefendant, Faller, to have the means of connecting these articles supplied. It is undoubtedly true, as claimed by counsel for plaintiff in error, that these articles have legitimate uses for which they can lawfully be sold; but from the evidence in this case the jury could properly find that the defendant was not in possession thereof, and was not offering the same for sale, for such legitimate purposes." Id.

Evidence that a three-gallon still sold by defendant was designed for and intended by seller for use in the manufacture of intoxicating liquor for beverage purposes was held to authorize a conviction under this section. Weinstein v. U. S. (C. C. A. Mass. 1923) 293 F. 388.

This section, making it unlawful to manufacture or possess for sale any vessel, etc., designed or intended for use in

the unlawful manufacture of intoxicating liquor, creates no presumption that the possession of a vessel that might be used as a still, or part of a still, is unlawful. The wrongful intent in manufacturing a vessel capable of being used as part of a still must be proved as an independent fact, or circumstances established from which it would be proper to permit a jury to find such intent. Evidence was held insufficient to show an intent to manufacture stills for use in the unlawful manufacture of liquor, in manufacturing copper vessels capable of being used as part of a still. Evidence claimed to show that S. N. manufactured and possessed vessels intended for use in the unlawful manufacture of intoxicating liquor at a factory building bearing the sign "S. N. & Son" did not support a conviction of H. N., without evidence that S. N. had only the one son, or that he even had a son, or that the business name was not a trade-name or the name of a corporation. Nosowitz v. U. S. (C. C. A. N. Y. 1922) 282 F. 575.

7. Punishment.—Imposition of separate maximum sentences for unlawful possession for sale and selling of substances and a formula intended for use in manufacture of intoxicating liquor in violation of this section was held not imposition of double punishment for one offense, on theory that possession was merged in sale. Hammerle v. U. S. (C. C. A. Ky. 1925) 6 F.(2d) 144.

A person convicted of a violation of this section as a first offense, may not be sentenced to imprisonment. Nosowitz v. U. S. (C. C. A. N. Y. 1922) 282 F. 575. The court said: "The sentence of the court was a prison term of 30 days to the plaintiff in error Hyman Nosowitz and 1 day to Simon Nosowitz. The learned Assistant United States Attorney, with commendable frankness, called our attention, on the oral argument, to the absence of statutory authority in the National Prohibition Act [incorporated in this title] to impose a prison term. Nowhere in the act is there a provision permitting imprisonment for the first violation of title 2, § 18, of this act [this section]. Section 29, title 2, of the National Prohibition Act [section 46 of this title], provides the penalty, which is, for the first offense, a fine of not more than $500; for the second offense, not less than $100 nor more than $1,000 or imprisonment for not more than 90 days; and for subsequent offenses, not less than $500 or imprisonment for not less than 3 months or more than 2 years. There is no evidence in the record showing that the plaintiffs in error had previously been convicted of any other offense."

8. Rights and remedies under contracts.—The sale of a preparation or substance designed or intended to be used in the unlawful manufacture of intoxicating liquor is violative of this section, and the purchase price therefor cannot be recovered. Three Star Food Products Corp. v. Ofsa (1923) 119 S. E. 859, 94 W. Va. 636, 29 A. L. R. 1053.

If, in an action to recover the purchase price of a substance sold for use in the unlawful manufacture of intoxicating liquor, the evidence is sufficient to reasonably warrant the jury in finding that the substance was sold in violation of this section, it is error to direct a verdict in plaintiff's favor. Id.

§ 31. Soliciting or receiving orders for liquor. No person shall solicit or receive, nor knowingly permit his employee to solicit or receive, from any person any order for liquor or give any information of how liquor may be obtained in violation of this chapter.* (Oct. 28, 1919, c. 85, Title II, § 19, 41 Stat. 313.)

* See the starred note to section 11 of this title.

§ 32. Right of action for injuries caused by intoxicated person. Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication, and in any such action such person shall have a right to recover actual and exemplary damages. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either wife or child shall be his or her sole and separate property.

Such action may be brought in any court of competent jurisdiction. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other. (Oct. 28, 1919, c. 85, Title II, § 20, 41 Stat. 313.)

Notes of Decisions

1. Persons given cause of action.—A person injured by reason of his own intoxication, or the administrator of one whose death was caused by intoxication, has no right of action under this section, provided the person intoxicated voluntarily and while in his right mind accepted and drank the liquor. Hoyt v. Tilton (1925) 81 N. H. 477, 128 A. 688.

2. Jurisdiction of state court.—A state court may enforce the right of action for damages for the unlawful sale of intoxicating liquor, since where an act of Congress in general terms confers a right and does not limit the courts in which such right may be enforced, state courts have jurisdiction. Smithers v. Brunkhorst (1922) 190 N. W. 349, 178 Wis. 530.

3. Pleading.—Allegation that plaintiff was shot and thereby injured by defendant when intoxicated, and that codefendant "assisted in procuring liquor for defendant which caused his intoxication," was held to state cause of action against codefendant under this section. Stein v. Rainey (Mo. Sup. 1926) 286 S. W. 53.

4. Evidence.—Where a judgment for the plaintiff in an action under this section is entered on default, the defendant is, nevertheless, entitled to introduce evidence in diminution of damages. Smithers v. Brunkhorst (1922) 178 Wis. 530, 190 N. W. 349.

5. Damages.—Exemplary damages may be recovered without a showing of malice or vindictiveness on the part of the defendant. Smithers v. Brunkhorst (1922) 190 N. W. 349, 178 Wis. 530.

Where plaintiff was injured by defendant when intoxicated, allegation that codefendant "assisted in procuring liquor for defendant, which caused his intoxication" was held to warrant assessment of exemplary damages, in view of this section; compensatory and exemplary damages claimed having been separately stated. Stein v. Rainey (Mo. Sup. 1926) 286 S. W. 53.

6. Rights under state laws.—Without request for instruction that punitive or exemplary damages might be allowed, Supreme Court would not decide whether damage rule under federal Prohibition Act (incorporated in this title) controls damages in state court. Karterman v. Sogura (1926) 248 P. 417, 140 Wash. 195.

Enactment of National Prohibition Act (incorporated in this title) and adoption of Eighteenth Amendment did not invalidate provisions of Dramshop Act (Illinois), permitting recovery of damages by wife under Civil Damage Act, from one who sold intoxicating liquor to her husband to her damage. Spousta v. Berger (1923) 231 Ill. App. 454.

§ 33. Property used in connection with violation of law as common nuisance; punishment for maintenance; liability of owners of buildings. Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this chapter, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this chapter, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction. (Oct. 28, 1919, c. 85, Title II, § 21, 41 Stat. 314.)

Notes of Decisions

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I. IN GENERAL

1. Validity.—This section and section 34 of this title, defining what shall constitute a nuisance, and conferring on courts of equity power to determine the facts and to abate such nuisances are constitutional. U. S. v. American Brewing Co. (D. C. Pa. 1924) 1 F.(2d) 1003.

This section does not take property without due process of law. Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800; U. S. v. Reisenweber (C. C. A. N. Y. 1923) 288 F. 520; U. S. v. Reinking (D. C. N. J. 1922) 283 F. 855.

Congress had authority, under the Eighteenth Amendment, to enact this section. U. S. v. Cohen (D. C. Mo. 1920) 268 F. 420.

Congress, like the states before the adoption of the Eighteenth Amendment, has the power to declare a place kept and maintained for the illegal manufacture and sale of liquors a common nuisance. Remus v. U. S. (C. C. A. Ohio, 1923) 291 F. 513, certiorari denied (1924) 44 S. Ct. 180, 263 U. S. 717, 68 L. Ed. 522.

"It cannot be doubted that Congress may constitutionally declare that a place occupied and used for the unlawful sale of intoxicating liquor is a public nuisance, and that the effect of such a declaration is to make such a place a nuisance, subject to abatement as such by courts of equity. * * * It must also be regarded as settled law that whatever means are reasonably necessary to abate such a nuisance, even to the extent of taking or destroying the property of an innocent owner, may be adopted without infringing any constitutional rights." U. S. v. Boynton (D. C. Mich. 1924) 297 F. 261.

2. Acts repealed.—See, also, notes to sections 1, 3, and 52 of this title.

Section 404 of Title 26, Internal Revenue, forbidding the concealing of untaxed liquor, was not impliedly repealed by this section and section 39 of this title. U. S. v. Turner (D. C. Va. 1920) 266 F. 248.

3. Operation and effect in general.—Section 35 of this title, making traveling to solicit orders for liquor a nuisance, without making act misdemeanor or fixing penalty, was not intended to make act crime, but remedy by injunction provided therein is exclusive, in view of different language of this section and penalty provided by section 46 of this title cannot be applied. U. S. v. Seibert (D. C. W. Va. 1924) 2 F.(2d) 80.

This section was adopted by the Wright Act and is part of the law of California. People v. Johnson (1923) 63 Cal. App. 178, 218 P. 449.

4. Searches.—Search of defendant's automobile on premises on which intoxicating liquor had been found, and which "bore the aspect of a common nuisance," under this section, was held not unreasonable, nor within constitutional inhibition. U. S. v. Neadeau (D. C. Wash. 1924) 2 F.(2d) 148.

Officer executing search warrant has no right to commandeer claimant's building for storage of property seized, and may remain only so long as is reasonably necessary to complete search and remove property. U. S. v. 63,250 Gallons of Beer (D. C. Mass. 1926) 13 F.(2d) 242.

5. Proceedings to abate nuisance.—See notes to section 34 of this title.

II. OFFENSES AND DEFENSES

11. Nature and elements of offense—In general.—It must be presumed that Congress, in enacting this section, used the word "nuisance" in its usual and ordinary legal significance, having in mind that it

could not pass a law which would wipe out the constitutional rights of the citizen in private property. U. S. v. Cohen (D. C. Mo. 1920) 268 F. 420.

What constitutes a common nuisance for the purpose of a criminal prosecution under this section also constitutes a common nuisance for the purpose of an injunction suit under section 34 of this title. U. S. v. Eilert Brewing & Beverage Co. (D. C. Ohio, 1921) 278 F. 659.

The unlawful keeping of liquor for sale on his premises by a defendant may constitute the separate offenses of unlawful possession of liquor and maintaining a common nuisance. Singer v. U. S. (C. C. A. N. J. 1923) 288 F. 695.

The test of a statutory nuisance, under this section, is not the number of sales or the length of time liquor is kept on the premises, but is whether the place is maintained for the keeping and sale of liquor, in the sense of the statute. U. S. v. Ward (C. C. A. Pa. 1925) 6 F.(2d) 182; Singer v. U. S. (C. C. A. N. J. 1923) 288 F. 695.

The word "kept," as used in this section, read in connection with the words with which it is immediately associated, means kept for sale or barter or other commercial purpose. Singer v. U. S. (C. C. A. N. J. 1923) 288 F. 695.

Though a single sale of liquor, or the mere unlawful possession, does not under all circumstances violate this section making it punishable to maintain a nuisance by keeping a place for the violation of the act, the circumstances surrounding the sale or the single act of possession may be such as to warrant the inference that the single act was part of a habit, and therefore sufficient to sustain a conviction for nuisance. Barker v. U. S. (C. C. A. W. Va. 1923) 289 F. 249, wherein it was said: "Each such case must therefore depend upon its own facts. If the evidence be confined to a single sale, with no evidence of other violations or habitual sales, and likewise no evidence from which such acts may reasonably be deduced, the penalties provided in the act for unlawful sale should alone apply; but, equally, evidence of a single sale in a place, from which the circumstances tend to show habitual violation, is enough to bring prosecution within the terms of the nuisance section and to make applicable the severer penalties which its terms provide."

This section penalizing as a nuisance the maintaining of premises on which liquor is manufactured and sold, implies a continuity of action for a substantial period. Hattner v. U. S. (C. C. A. Ohio, 1923) 293 F. 381.

Possession of liquor and maintenance of nuisance are continuing offenses. Marron v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 251.

The nuisance denounced by this section exists as soon as the specified violations occur, and is not created by conviction of defendant for such violations. U. S. v. Stevens (1925) 130 A. 249, 103 Conn. 7.

Illegal traffic in intoxicating liquor is a public nuisance per se. U. S. v. Sumner (Sup. 1925) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (App. Div. 1926) 214 N. Y. S. 930.

12. —— Places constituting nuisance in general.—Under this section, liquor nuisance may be any room, house, building, boat, vehicle, structure, or any other place where intoxicating liquor is manufactured, sold, kept, or bartered illegally. U. S. v. Sumner (Sup. 1925) 211 N. Y. S. 707, 125 Misc. Rep. 658, affirmed (App. Div. 1926) 214 N. Y. S. 930.

The word "place," as used in this section, defining common nuisance as room, house, building, boat, vehicle, structure, or place where liquor is sold, is limited to things of same kind. Koth v. U. S. (C. C. A. Idaho, 1926) 16 F.(2d) 59.

To constitute a "common nuisance," under this section, because intoxicating liquors are "kept" in the premises, they must be kept for commercial purposes. Rossi v. U. S. (C. C. A. Colo. 1926) 16 F. (2d) 712.

A roadhouse or "ranch," where liquor is habitually brought by guests and there consumed, with knowledge of the proprietor and to his profit, is a "common nuisance," under this section, and the proprietor is guilty of maintaining the same. Id.

Place where liquor can be purchased by guests whenever desired, though from outside parties, is a common nuisance. Id.

The word "kept," read in connection with the context, means kept for sale or barter or other commercial purposes. U. S. v. Ward (C. C. A. Pa. 1925) 6 F.(2d) 182.

A restaurant, where patrons consumed intoxicating liquor brought with them, was held a place where liquors were "kept," within meaning of this section, and hence a common nuisance, subject to abatement proceedings under section 34 of this title. Fritzel v. U. S. (C. C. A. Ill. 1927) 17 F.(2d) 965.

Roadhouse, where intoxicating liquor was consumed, was held "nuisance," notwithstanding owners did not own, sell, or barter liquor. U. S. v. Budar (D. C. Wis. 1925) 9 F.(2d) 126.

That defendant, making a single sale of whisky, had only just opened his shop, did not prevent it from at once becoming a place in which liquors were habitually sold, and so a nuisance, within this section, where it appeared that the shop was from the outset one in

which liquors were to be unlawfully sold. Schechter v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 881, certiorari denied (1925) 46 S. Ct. 21, 269 U. S. 561, 70 L. Ed. 412.

Under this section, any place in state where intoxicating liquor is illegally sold is public nuisance, and in this respect act is more binding on state than its own laws, because it cannot amend or repeal federal laws. U. S. v. Sumner (Sup. 1925) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (App. Div. 1926) 214 N. Y. S. 930.

Place where intoxicating liquor is sold is not a nuisance per se. People v. Cook (App. Div. 1927) 221 N. Y. S. 96.

The mere use of premises as an office from which to give directions as to a liquor business or at which to receive payments, or carrying in one's pocket on such premises a book showing unlawful transactions in liquor, does not make the premises a place where liquor is kept or sold, so as to constitute a "nuisance," under this act. Miller v. U. S. (C. C. A. Ohio, 1924) 300 F. 529, certiorari denied (1924) 45 S. Ct. 123, 266 U. S. 624, 69 L. Ed. 474.

Under Code Cr. Proc. N. Y. § 953, and section 547 of Title 18, Criminal Code and Criminal Procedure, place where intoxicating liquors are sold in violation of Volstead Act, is "public nuisance," and person maintaining it is guilty of misdemeanor, under Penal Law N. Y. § 1530, and courts may direct abatement of such nuisance, with costs to be paid by defendant. U. S. v. Sumner (Sup. 1925) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (App. Div. 1926) 214 N. Y. S. 930.

13. —— Vehicles.—Under this section, an automobile used in the illegal transportation of liquor is not forfeited as a common nuisance where it was not alleged that the intoxicating liquor was manufactured, sold, or bartered in the automobile or kept therein and for such purpose; "kept" meaning the keeping for sale or other commercial purpose. U. S. v. One Cadillac Touring Car (D. C. Mich. 1921) 274 F. 470.

Automobile used in the mere transportation of intoxicating liquor is not a "common nuisance," within this section, whether used once or often, whether quantity of liquor is great or small, whether it is concealed or carried openly or the car is specially designed for the convenient transportation and concealment of such liquor. McLean v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 738.

14. —— Keeping or maintaining of place.—Maintaining place where customers habitually bring and consume their own liquor is a "keeping of liquor for commercial purposes," and "nuisance." Notary v. U. S. (C. C. A. Colo. 1926) 16 F.(2d) 434.

Maintenance of premises for sale and possession of intoxicating liquor in violation of National Prohibition Act is not a crime against state of New York, nor a "public nuisance." People v. Conti (1926) 216 N. Y. S. 442, 127 Misc. Rep. 244.

15. —— Manufacture of liquor.—One who manufactures intoxicating liquors exclusively for use in his own home, and not for commercial purposes, on two isolated occasions a year apart, does not maintain a common nuisance. U. S. v. Hill (D. C. Md. 1924) 1 F.(2d) 964.

16. —— Sale of liquor.—Common nuisance, as defined in this section, implies a more or less continuous practice or habit of selling intoxicating liquor on the premises, and a single sale, standing by itself, does not constitute a "nuisance." Schechter v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 881, certiorari denied (1925) 46 S. Ct. 21, 269 U. S. 561, 70 L. Ed. 412.

But, other essentials being present, a single sale may establish the existence of a nuisance. Singer v. U. S. (C. C. A. N. J. 1923) 288 F. 695.

A single sale of liquor may establish a nuisance in violation of this section, and, unless circumstances show contrary, should be held a nuisance. U. S. v. Stevens (1925) 130 A. 249, 103 Conn. 7.

One sale or a number of sales of liquor, when regarded in connection with attendant circumstances, may or may not, in the mind of the judge who has the responsibility of decision, determine the fact of nuisance, and in reaching his decision the judge exercises his discretion. U. S. v. Ward (C. C. A. Pa. 1925) 6 F.(2d) 182.

A single sale of whisky was held to constitute maintaining a nuisance, within this section, where it appeared that any one might have come into defendant's shop and bought whisky. Schechter v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 881, certiorari denied (1925) 46 S. Ct. 21, 269 U. S. 561, 70 L. Ed. 412.

Common nuisance exists, where whisky was sold only one day. Knable v. U. S. (C. C. A. Ohio, 1925) 9 F.(2d) 567.

In Muncy v. U. S. (C. C. A. W. Va. 1923) 289 F. 780, it was held that evidence of the sale of a pint of whisky by a defendant at her residence was not sufficient to sustain a conviction for maintaining a nuisance where no other liquor was found on the premises.

Sale of intoxicating liquor in home to friends and acquaintances without annoying public was held not "public nuisance" within statutes. People v. Cook (App. Div. 1927) 221 N. Y. S. 96.

17. —— Possession of liquor.—Unlawful possession of liquor is not necessarily an element of the offense of maintaining a nuisance under this section, though the possession existed at the same time as maintenance of the nuisance, since it may

have been for other illegal purposes than barter or sale, and the two offenses may be charged separately. Feinberg v. U. S. (C. C. A. Colo. 1924) 2 F.(2d) 955.

Private possession of intoxicating liquor in a private place, though unlawfully obtained and constituting crime of unlawful possession, does not constitute nuisance under this section. People v. Mehra (1925) 238 P. 802, 73 Cal. App. 162.

So unlawful possession of intoxicating liquor alone will not warrant a conviction, under this section, for maintaining a common nuisance, but there must be some evidence of facts or circumstances reasonably raising the inference of a purpose to sell. Id.

But possession of intoxicating liquor in a place kept by defendant as saloons ordinarily are has been held sufficient under section 50 of this title to sustain a conviction for maintaining a nuisance. Stoecko v. U. S. (C. C. A. N. J. 1924) 1 F.(2d) 612, wherein the court said: "While not supported by an assignment of error, the argument of the defendant is directed in large part toward the contention that a single offense of unlawful possession or sale of intoxicating liquor is not sufficient to sustain the charge of maintaining a common nuisance. The possession of liquors by one maintaining a saloon is made prima facie evidence by section 33 of the National Prohibition Act [section 50 of this title] that such liquor is kept for the purposes constituting the premises a nuisance under section 21 [this section], and this court has held that a single sale or brief possession, when accompanied by facts showing that the place where the sale was made or possession had was maintained for keeping and selling intoxicating liquor, is sufficient to sustain the charge of maintaining a statutory nuisance. Singer v. United States (C. C. A. N. J. 1923) 288 F. 695; Hohenadel Brewing Co. v. United States (C. C. A. Pa. 1924) 295 F. 489. The evidence that the place was maintained as saloons ordinarily are, that the defendant was the proprietor and was present behind the bar, that the glasses taken from the table in the barroom where men had been seated contained sufficient whisky for the witnesses to identify it as such, that a woman was seen standing at the table and attempted to carry the glasses away to the washstand, and that bottles partly filled with whisky were found upon a shelf in a room back of the barroom was proof of sufficient circumstances in connection with the prima facie evidence sanctioned under section 33 to go to the jury for the determination of the purpose for which the liquor was there kept and the responsibility of the defendant for its being so kept."

"The statute does not provide that any prescribed length of time of the unlawful possession of intoxicating liquor shall be necessary in order to constitute a nuisance. It is the fact of the unlawful possession within the prohibition of the statute that constitutes the offense, and that offense may obviously be committed in one day, as well as in two or more." Feigin v. U. S. (C. C. A. Cal. 1922) 279 F. 107, certiorari denied (1922) 43 S. Ct. 98, 260 U. S. 741, 67 L. Ed. 490.

This section applies to the keeping of liquor only when it is kept for sale or barter, or other commercial purpose, not to the keeping of intoxicating liquor in a storage warehouse for private consumption by the owner. Street v. Lincoln Safe Deposit Co. (N. Y. 1920) 41 S. Ct. 31, 254 U. S. 88, 65 L. Ed. 151, 10 A. L. R. 1548, reversing (D. C. 1920) 267 F. 706.

Possession of beer found on brewery premises after revocation of dealcoholizing permit was unlawful, and in itself constituted a common nuisance, in violation of this section, and also violated section 12 of this title, in view of section 50 of this title, so as to authorize destruction of manufacturing equipment found on premises. U. S. v. Auto City Brewing Co. (D. C. Mich. 1925) 5 F.(2d) 362.

18. —— Transportation of liquor.—Mere transportation of whisky does not constitute a "nuisance," under this section. Green v. U. S. (C. C. A. Ohio, 1925) 8 F.(2d) 140.

In the absence of any evidence that liquor is regularly bartered or sold from an automobile, mere transportation of liquor does not constitute a nuisance, under this section and section 40 of this title. U. S. v. Emmons (D. C. Cal. 1925) 3 F.(2d) 503.

19. Persons liable.—Employees of place to which intoxicating liquor is habitually brought by customers and consumed by them to proprietor's profit, who were not cognizant of proprietor's purpose, and personally endeavored to prevent bringing of liquor on premises, were not guilty of violating this section; criminal intent being absent. Notary v. U. S. (C. C. A. Colo. 1926) 16 F.(2d) 434.

If a person maintains a place where intoxicating liquor, to his knowledge, is manufactured, sold, kept, or bartered, in violation of this section, he is guilty of maintaining a "common nuisance," though he did not personally possess, sell, keep or manufacture the liquor. Rossi v. U. S. (C. C. A. Colo. 1926) 16 F.(2d) 712.

One may maintain nuisance without having knowledge of actual sales of liquor. U. S. v. Gaffney (C. C. A. N. Y. 1926) 10 F.(2d) 694.

Knowledge of the owner or agent, in control of rented premises, that they are being used for the unlawful manufacture of liquor and his acquiescence therein, makes him an aider and abettor, and subject to indictment as a principal. Steir

v. U. S. (C. C. A. Mass. 1924) 2 F.(2d) 149.

Conviction of defendant for maintaining a nuisance could not be sustained merely because he was present in room where still was in operation. De Gregorio v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 295.

"Two or more individuals may join in the maintenance of a nuisance of this character upon premises owned, occupied, and controlled by one of them. If the proof shows that each contributed property, money, or service necessary to the commission of the offense—that is to say, if one furnishes the premises, another the intoxicating liquor, another delivers it to the premises, another stands guard, another receives and stores the liquor, and still another sells the same, all may be equally guilty as principals in maintaining a public nuisance under the provisions of section 21 of title 2 of the National Prohibition Act [this section]; but if any one of these defendants was not shown to have participated in the actual 'maintenance,' he still might be subject to conviction by virtue of the provisions of section 332 of the Penal Code [section 550 of Title 18, Criminal Code and Criminal Procedure] with reference to aiders and abettors, and no exceptions were taken to the charge of the court by which the provisions of that section were applied to the facts of this case." Remus v. U. S. (C. C. A. Ohio, 1923) 291 F. 513, certiorari denied (1924) 44 S. Ct. 180, 263 U. S. 717, 68 L. Ed. 522.

20. —— Landlords.—The owner of a building, which he manages and in which he resides, who has knowledge that a tenant is maintaining nuisance therein in violation of law, has been held an aider and abettor, and subject to indictment as principal. Rosenberg v. U. S. (C. C. A. Mo. 1926) 15 F.(2d) 179.

Landlord, knowingly permitting liquor to be manufactured on premises, is guilty of maintaining "nuisance," in contravention of this section. Di Bonaventura v. U. S. (C. C. A. W. Va. 1926) 15 F.(2d) 494.

To justify a verdict of guilty on the charge of maintaining a common nuisance under this section, it is not necessary that defendant must have made unlawful sales or have unlawful possession of intoxicating liquors, if he, with full knowledge that his premises are so used, permits and aids the tenants to unlawfully keep and sell liquor on the premises owned by him. Dallas v. U. S. (C. C. A. Minn. 1925) 4 F. (2d) 201.

This section does not prevent a landlord from being prosecuted under section 550 of Title 18, Criminal Code and Criminal Procedure, making any one aiding or abetting in the commission of an offense against the United States a principal, and section 12 of this title, prohibiting the manufacturing of liquor, where a tenant manufactures a liquor on the leased premises, as a commission of one of these offenses is not necessarily a commission of the other. For a landlord to be a principal, within section 550 of Title 18, making one aiding or abetting in the commission of an offense against the United States a principal, after notice or knowledge that tenant is manufacturing liquor on the premises, a reasonable time must elapse for the landlord to stop the illicit business, and even a longer nonexercise of a power to stop would not necessarily be aiding or abetting (citing Words and Phrases, First and Second Series, Aiding or Abetting). Reynolds v. U. S. (C. C. A. Tenn. 1922) 282 F. 256.

21. Former jeopardy.—Acquittal on count charging unlawful possession was held not to invalidate conviction on second count charging maintenance of nuisance. Baldini v. United States (C. C. A. Nev. 1923) 286 F. 133, certiorari denied (1923) 43 S. Ct. 524, 262 U. S. 749, 67 L. Ed. 1214.

Where, in a prosecution for maintaining liquor nuisance at a certain address, in violation of the National Prohibition Act, tit. 2 (incorporated in this title), the jury was discharged because proof showed the nuisance was maintained at another address, accused was not twice put in jeopardy by the prosecution of a second information charging the same offense at the correct address, since under section 21 the specific building or place where the liquor is made and kept is material, and the facts necessary to conviction under the first charge would not support conviction under the second charge, or vice versa. Hattner v. U. S. (C. C. A. Ohio, 1923) 293 F. 381.

Where defendant was prosecuted in the superior court under information which purported to charge offense of maintaining common nuisance under this section, but which in fact charged offense only of unlawful possession of intoxicating liquors, defendant, having been previously convicted in justice's court for the same act, is entitled, under Pen. Code (California) § 1262, to be discharged. People v. Mehra (1925) 238 P. 802, 73 Cal. App. 162; People v. Fuller (1925) 238 P. 809, 73 Cal. App. 183.

III. PROSECUTION AND PUNISHMENT

31. Indictment and information—Prosecution by information.—The imprisonment imposed cannot be at hard labor or in a penitentiary, and the offense, not being infamous, may be prosecuted by information. Brede v. Powers (1923) 263 U. S. 4, 44 S. Ct. 8, 68 L. Ed. 132, affirming (D. C. N. Y. 1922) 279 F. 147. To same effect see Wyman v. U. S. (N. Y. 1923) 263 U. S. 14, 44 S. Ct. 10, 68 L. Ed. 136; Remus

v. U. S. (C. C. A. Ohio, 1923) 291 F. 513; Rossini v. U. S. (C. C. A. Minn. 1925) 6 F. (2d) 350.

32. —— Requisites and sufficiency.—An indictment under this section, for maintaining a nuisance, which follows the language of the statute, is sufficient, and it is not necessary to allege that defendant was in possession or control of the building wherein the nuisance was maintained. Brown v. U. S. (C. C. A. Ill. 1921) 276 F. 122.

An information charging defendant with maintaining a common nuisance, in that he "willfully and unlawfully" kept on the premises described certain described intoxicating liquor, and which follows the language of the statute, is sufficient. It need not allege that the possession of liquor in the place described was continued for more than one day. Feigin v. U. S. (C. C. A. Cal. 1922) 279 F. 107, certiorari denied (1922) 43 S. Ct. 98, 260 U. S. 741, 67 L. Ed. 490.

Charge that defendants did unlawfully "maintain a common nuisance" in "violation of National Prohibition Act" (incorporated in this title) was held insufficient. Aroniss v. U. S. (C. C. A. N. J. 1926) 13 F.(2d) 620.

Defective indictment for maintaining nuisance was held not aided by reference to place involved as a "café." Id.

A count of an information charging that defendant knowingly, willfully, and unlawfully maintained a room, building, and place, to wit, the M. Buffet, Seventh and F. streets, in the city named, where intoxicating liquor, namely, whisky, containing alcohol in excess of one-half of 1 per cent. was kept and sold, was held sufficient to state an offense. Vesely v. U. S. (C. C. A. Cal. 1921) 276 F. 693, certiorari denied (1922) 42 S. Ct. 590, 259 U. S. 588, 66 L. Ed. 1077.

An allegation that the defendant maintained a common nuisance, in that he willfully, unlawfully, and knowingly did keep on the premises certain described intoxicating liquors as alleged, was held sufficient to comply with this section, and under the provisions of section 49 of this title, it was unnecessary that the indictment include more. Herine v. U. S. (C. C. A. Cal. 1921) 276 F. 806.

An information charging that defendants unlawfully, willfully, and knowingly violated this section by maintaining a common nuisance on certain premises, by unlawfully, willfully, and knowingly keeping a quart of brandy, containing one-half of 1 per cent. or more of alcohol by volume, was held sufficient to inform the defendants of the offense charged. Kathriner v. U. S. (C. C. A. Cal. 1921) 276 F. 808.

An indictment under this section, which alleged in substance that defendants, at some time and at some place within the district, did unlawfully keep ——— cases of intoxicating liquor on board a certain launch was held insufficient, in that it did not specify the time or place or describe the vessel or the liquor, or set forth any facts showing that the "keeping" was unlawful, or that it was kept for such time as to constitute a "maintaining," within the statute. U. S. v. Dowling (D. C. Fla. 1922) 278 F. 630.

An information describing the premises on which a nuisance was maintained, so far as it could be located by public roads, streets, streams and other fixed monuments, and alleging that the premises were known as "the Dater farm otherwise known as the Death Valley farm," was a sufficient description of the premises, and under it the government was required to prove the premises were known by those names to the public generally. Remus v. U. S. (C. C. A. Ohio, 1923) 291 F. 513, certiorari denied (1924) 44 S. Ct. 180, 263 U. S. 717, 68 L. Ed. 522.

An information charging that defendants maintained on the premises described a place where intoxicating liquor was manufactured, sold, kept, and bartered for beverage purposes, in violation of this section, was a sufficient averment that defendants had committed the particular acts which are declared by this section to constitute the maintenance of a common nuisance. Id.

Indictment for maintenance of nuisance, held sufficient. Furlong v. U. S. (C. C. A. Neb. 1926) 10 F.(2d) 492.

Information for maintaining liquor nuisance held to charge an offense. Cronin v. Ennis (C. C. A. Neb. 1926) 11 F.(2d) 237.

33. —— Issues, proof, and variance.—Under this section, where information charged maintenance of liquor nuisance at particular place, it was necessary for government to prove maintenance at that place. Heitman v. U. S. (C. C. A. Cal. 1925) 5 F.(2d) 887.

A variance between an indictment charging that defendants maintained a common nuisance in violation of this section, in that they "did unlawfully, willfully and knowingly manufacture, sell and keep for sale for beverage purposes, intoxicating liquor containing more than one-half of one per cent. by volume, to wit, whisky," and proof of the manufacture of a mixture which contained whisky, but did not resemble whisky any more than it resembled any of the other ingredients, is fatal. Brauer v. U. S. (C. C. A. N. J. 1924) 299 F. 10. The court said:

"There is no evidence that the intoxicating liquors which the count charges that the defendants manufactured, sold and kept for sale on the premises was whisky. Therefore this allegation of an essential element of the offense is not sustained by proof. True, in the mixture described in the first count, whisky was one

of a number of ingredients; but the mixture no more resembled whisky than it resembled any one of the other ingredients. It was not whisky.

"The draftsman of this count was free to select as a name for the concoction any appropriately descriptive term from the list supplied by section 1 of title 2 of the act [section 4 of this title]. And evidently this is what he did. He selected 'whisky.' Whisky is a commodity of known chemical composition; its name, since the passage of the National Prohibition Act [incorporated in this title], has acquired a certain legal signification when used in indictments. Schliefer v. United States (C. C. A. Mo. 1923) 288 F. 370; Singer v. United States (C. C. A. N. J. 1922) 278 F. 415, 418. Having so used it in this indictment and having charged that it was the thing unlawfully manufactured, kept and sold on the premises, the government must, of course, prove the charge as made. This it has not done.

"'A conviction must be good in all its parts; the indictment must be supported by the evidence, and the judgment must be supported by both.' King v. Solomons, 1 T. R. 251. Lacking these qualities—fundamental in the administration of justice—we are constrained to reverse the judgment below as to all defendants on both counts of the indictment and direct that a new trial be awarded."

34. Matters to be proved.—Proof of unlawful alcoholic content of liquor trafficked in held not necessary on charge of conspiracy to violate National Prohibition Act (incorporated in this title). Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F. (2d) 505, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. —.

To sustain conviction on charge of maintaining nuisance, it is not necessary to prove ownership in defendant, but only joint interest and concern in operation of establishment. Brownlow v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 711.

Where there was sufficient evidence to sustain a finding that a defendant maintained a nuisance, by keeping intoxicating liquors in his saloon for sale, it was not necessary to prove that he had knowledge of any actual sale. Wiggins v. U. S. (C. C. A. N. Y. 1921) 272 F. 41.

35. Admissibility of evidence—In general.—Defendant eliciting damaging collateral matter on cross-examination and attempting to contradict same cannot object to rebuttal testimony on same issue. Gray v. U. S. (C. C. A. Cal. 1926) 9 F.(2d) 337.

Much latitude is permitted in proving an alleged liquor nuisance. Brown v. U. S. (C. C. A. S. C. 1925) 6 F.(2d) 522.

Under this section, where information charged maintenance of liquor nuisance at particular place, it was necessary for government to prove maintenance at that place, and defendant had right to introduce testimony to prove that place described in information was not where alleged offense was committed. Heitman v. U. S. (C. C. A. Cal. 1925) 5 F.(2d) 887.

If from use or by any other means a person knows what whisky or wine is, he may be a competent witness to testify that liquor purchased by him is such; a scientific expert not being required. Strada v. U. S. (C. C. A. Cal. 1922) 281 F. 143.

In a prosecution for selling liquor and maintaining nuisance, testimony of taxi driver that defendant, keeping house of ill fame, paid him agreed commission on money expended by customers, including amount expended for liquor, was held not hearsay. Harris v. U. S. (C. C. A. Mich. 1926) 13 F.(2d) 849.

Where defendants, charged with maintaining a common nuisance by unlawfully keeping and selling liquor in their dwelling house, testified that they had wine, but that it was kept for personal use, and that they so told the prohibition agents, testimony of such agents as to the liquor they found on the premises was competent. Panzich v. U. S. (C. C. A. Cal. 1923) 285 F. 871, certiorari denied (1923) 43 S. Ct. 524, 262 U. S. 749, 67 L. Ed. 1213.

Testimony of sales of whisky made to various persons is relevant to a charge of maintaining a common nuisance under this section. McDonough v. U. S. (C. C. A. Cal. 1924) 299 F. 30, motion for leave to file supplemental petition for rehearing denied (C. C. A. 1924) 1 F.(2d) 147, and certiorari denied (1924) 45 S. Ct. 95, 266 U. S. 613, 69 L. Ed. 468.

36. —— Reputation.—In prosecution under information charging maintenance of liquor nuisance, proof of general reputation is admissible. Merrill v. U. S. (C. C. A. Or. 1925) 6 F.(2d) 120.

Under an indictment for maintaining a common nuisance, where liquor was unlawfully sold, evidence of the bad reputation of the place is admissible. Ryan v. U. S. (C. C. A. Ga. 1922) 285 F. 734.

Evidence of reputation of accused's place of business held admissible to support charge of maintaining nuisance. Chapman v. U. S. (C. C. A. Ind. 1925) 9 F.(2d) 790.

37. —— Other offenses and acts.—In prosecution for maintaining liquor nuisance, evidence of sale of other liquors than specified in information is proper. Brown v. U. S. (C. C. A. S. C. 1925) 6 F. (2d) 522.

Evidence of prior sales is admissible. Merrill v. U. S. (C. C. A. Or. 1925) 6 F. (2d) 120.

Evidence of sales of liquor on the premises shortly before the date alleged is admissible. Peterson v. U. S. (C. C. A. Wash. 1925) 4 F.(2d) 702, certiorari de-

nied (1925) 46 S. Ct. 19, 269 U. S. 555, 70 L. Ed. 409.

On a charge of maintaining a common nuisance under this section, by the sale of liquor on certain premises, evidence of prior sales there at near the same time and while before that act went into effect, at a time when such sales were illegal, was held material and competent. Carpenter v. U. S. (C. C. A. W. Va. 1922) 280 F. 598.

In prosecution for sale and possession of intoxicating liquor, and for maintaining nuisance, evidence of sales other than charged was held admissible on charge of maintaining nuisance. Stockman v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 211.

Evidence of sale of liquor in premises a short time before the date on which the proprietor was charged with maintaining a nuisance therein was held admissible, as showing guilty knowledge and intent. Rossini v. U. S. (C. C. A. Minn. 1925) 6 F. (2d) 350.

In a prosecution for maintaining a public place where intoxicating liquor was sold, kept, and bartered, testimony of the chief of police, who had searched defendant's hotel, had found intoxicating liquor, and had arrested defendant, that he had charged the defendant with disorderly conduct, and that she had pleaded guilty, was held inadmissible; but it was held that a record of a prior judgment and a plea of guilty of having on a certain date kept a place where intoxicating liquor was sold would have been admissible, on the ground that such an offense was connected with the charge as part of a continuing offense. Hazelton v. U. S. (C. C. A. Idaho, 1923) 293 F. 384.

Admitting evidence, in prosecution for selling liquor and maintaining nuisance, that defendant was also keeping house of prostitution, not as proving separate offense, was held proper as limited by court. Harris v. U. S. (C. C. A. Mich. 1926) 13 F. (2d) 849.

In a prosecution under this section for maintaining a common nuisance by carrying on a restaurant where intoxicating liquors were sold between certain dates, evidence of sales of liquor prior to the dates charged was admissible as tending to establish an unlawful status, not limited in duration to the precise time of the occurrences charged, but of a more or less permanent character. In a prosecution for maintaining a common nuisance in that from "about" October 8, 1920, to November 8, 1920, defendant carried on a restaurant where intoxicating liquors were sold, it was not error to receive evidence of sales of wine at the restaurant a few days prior to October 8th; there being continuity of wrongdoing implied in the charge. Strada v. U. S. (C. C. A. Cal. 1922) 281 F. 143.

In a prosecution under this section wherein the indictment charges the defendant with having kept and maintained a common nuisance in a certain town, to wit, a building wherein intoxicating liquor was manufactured and kept in violation of this section, evidence that at about the same time the defendant was apprehended at another place with intoxicating liquor in his possession, which was similar to that found on the premises described in the indictment and which was contained in bottles similar to those found on such premises, is relevant and admissible, even though it tends to show the commission of a separate and distinct crime. Basich v. U. S. (C. C. A. Or. 1921) 276 F. 290.

In prosecution for maintenance of liquor nuisance, it was error to permit state's witness to testify that on prior occasion he, with others, had found defendant and another repairing barn for operation of illicit distillery. Heitman v. U. S. (C. C. A. Cal. 1925) 5 F.(2d) 887.

Under a charge of maintaining a nuisance on September 26, evidence of a sale of liquor on the premises on the preceding August 6 was held not too remote in time to support the charge, where there had been no change of ownership or character of the business in the meantime. Rossini v. U. S. (C. C. A. Minn. 1925) 6 F.(2d) 350.

38. Sufficiency of evidence—In general.—While a single sale is not of itself engaging in the liquor business, yet proof of a single sale under some circumstances may be sufficient to justify the jury in finding that the seller was engaged in that business. The court said: "Upon the count for maintaining a nuisance, the issue of fact involved was fairly and correctly submitted to the jury. Under the old internal revenue law it became a familiar rule that, while making a single sale was not of itself engaging in the retail liquor business, yet proof of the making of a single sale might be sufficient proof to justify the jury in finding that the one who made the sale was engaged in that business. Bailey v. U. S. (Tenn. 1919) 259 F. 88, 170 C. C. A. 156. The analogy clearly applies to section 21 of the National Prohibition Act [this section]. One act of possession or sale in a place does not necessarily and of itself constitute the maintaining of that place for the forbidden purposes, but proof of such single act, under some surroundings and circumstances, will support a jury in finding that it was so maintained." Miller v. U. S. (C. C. A. Ohio, 1924) 300 F. 529, certiorari denied (1924) 45 S. Ct. 123, 266 U. S. 624, 69 L. Ed. 474. To the same effect, see Marshallo v. U. S. (C. C. A. N. Y. 1924) 298 F. 74.

"A single sale or a brief possession, when surrounded by facts showing that the place where the sale was made or possession had was maintained for keep-

ing and selling intoxicating liquor, is sufficient to sustain the charge of maintaining a statutory nuisance. Singer v. United States (C. C. A. N. J. 1923) 288 F. 695; Lewinsohn v. United States (C. C. A. Ill. 1922) 278 F. 421; Barker v. United States (C. C. A. W. Va. 1923) 289 F. 249." John Hohenadel Brewing Co., Inc., v. U. S. (C. C. A. Pa. 1924) 295 F. 489.

In a prosecution under this section, the voluntary admission of defendant to the officers making the arrest that he was proprietor of the place and owner of the liquors was held sufficient proof of such fact. Wiggins v. U. S. (C. C. A. N. Y. 1921) 272 F. 41.

Evidence of illegal transportation of liquor in an automobile is insufficient to sustain a charge of maintaining a nuisance. Withrow v. U. S. (C. C. A. W. Va. 1924) 1 F.(2d) 858.

Where the indictment charged unlawful possession of intoxicating liquors in one count, and maintaining a nuisance for the unlawful sale of intoxicating liquor in a second count, evidence which, in addition to establishing the possession as alleged, tended to show sales to various individuals on different occasions, was held sufficient to establish the offense of maintaining a nuisance, apart from the offense of possessing the liquor, so that conviction on the first count did not bar conviction on the second. Page v. U. S. (C. C. A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S. Ct. 461, 258 U. S. 627, 66 L. Ed. 799.

See, also, Cook v. U. S. (C. C. A. W. Va. 1924) 299 F. 291; South Fork Brewing Co. v. U. S. (C. C. A. Pa. 1924) 1 F.(2d) 167, certiorari denied (1924) 45 S. Ct. 125, 266 U. S. 626, 69 L. Ed. 475, and affirmed (1926) 46 S. Ct. 349, 270 U. S. 631, 70 L. Ed. 770; U. S. v. Reisenweber (C. C. A. N. Y. 1923) 288 F. 520.

39. —— Sufficiency to sustain conviction.—Proof of the sale of liquor on premises on numerous occasions is sufficient to sustain a conviction for maintaining a common nuisance. Ryan v. U. S. (C. C. A. Ga. 1922) 285 F. 734.

Conviction of maintaining nuisance on evidence of sale of intoxicating liquor after date of verification of information cannot be sustained. Landfield v. U. S. (C. C. A. Cal. 1925) 9 F.(2d) 315.

In a prosecution for unlawful possession of intoxicating liquor and maintaining a common nuisance for the sale of such liquor at a club, evidence that one of the defendants was a member and officer of the club and that he occasionally tended the bar, though that was generally done by others, and that he was present on the night of the raid, was held sufficient to warrant the jury in convicting that defendant. Page v. U. S. (C. C. A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S. Ct. 461, 258 U. S. 627, 66 L. Ed. 799.

Evidence that defendant made a sale of liquor for beverage purposes on his premises, and that he had a quantity thereon, was held sufficient to sustain a conviction on count charging maintenance of a common nuisance, in violation of this section. Fassolla v. U. S. (C. C. A. Cal. 1922) 285 F. 378.

In a prosecution for maintaining a nuisance by selling and keeping for sale intoxicating liquors on the premises, evidence held sufficient to sustain the conviction. Young v. U. S. (C. C. A. Cal. 1921) 272 F. 967.

Evidence held ample to justify a conviction for maintaining a common nuisance by unlawfully keeping alcoholic liquor for beverage purposes. Herine v. U. S. (C. C. A. Cal. 1921) 276 F. 806.

Evidence that defendant made a sale of liquor for beverage purposes on his premises, and that he had a quantity thereon, held sufficient to sustain a conviction on three counts charging respectively unlawful sale, unlawful possession, and maintaining a "common nuisance." Fassolla v. U. S. (C. C. A. Cal. 1922) 285 F. 378.

Evidence held to sustain conviction of attorney for roadhouse for participating in conspiracy to maintain roadhouse as common nuisance, in violation of National Prohibition Act (incorporated in this title). Hacker v. U. S. (C. C. A. Nev. 1925) 5 F.(2d) 132.

Evidence of two sales of liquor at accused's drug store within a few days of each other, and of the finding of 2½ gallons of alcohol in the drug store, held sufficient to justify conviction on count charging maintenance of nuisance by keeping place where intoxicating liquor for beverage purposes was kept for sale and sold. Hermansky v. U. S. (C. C. A. Neb. 1925) 7 F.(2d) 458.

Evidence held to sustain conviction for maintaining nuisance by keeping liquor for sale and for unlawful possession. Armstrong v. U. S. (C. C. A. Cal. 1926) 16 F.(2d) 62, certiorari denied (1927) 47 S. Ct. 571, 71 L. Ed. —.

Evidence held not to support conviction for maintaining nuisance. Riggs v. U. S. (C. C. A. W. Va. 1924) 299 F. 273.

Evidence held insufficient to sustain conviction of the president of a brewery company, whose brewery was being operated by a receiver, and a salesman for the product, as parties to the maintenance of a nuisance by the receiver. Hilsinger v. U. S. (C. C. A. Ohio, 1924) 2 F.(2d) 241, affirming (D. C. 1922) U. S. v. Hilsinger, 284 F. 585, and certiorari denied Hilsinger v. U. S. (1924) 45 S. Ct. 100, 266 U. S. 622, 69 L. Ed. 473.

In prosecution for maintaining a nuisance, in violation of National Prohibi-

tion Act (incorporated in this title), where it appeared that accused had severed connection with premises prior to time of offense, evidence held insufficient to support conviction. Boitano v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 324.

In prosecution of husband and wife for violation of the National Prohibition Act (incorporated in this title), by maintaining a common nuisance and unlawful possession of intoxicating liquor, evidence held insufficient to sustain conviction of wife. Gazzera v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 467.

40. Questions for jury.—In a prosecution for maintaining a nuisance and for unlawful possession of intoxicating liquor, under the National Prohibition Act, evidence held to make question of guilt question for jury, and to sustain a verdict of guilty. Traversi v. U. S. (C. C. A. Cal. 1923) 288 F. 375.

Evidence that bartender sold beer and whisky in defendant's barroom and placed the money in defendant's cash register, and that other liquor belonging to defendant was on the premises, warranted inference that the bartender was defendant's representative, though defendant was not present, and made case for jury as to defendant's maintenance of a nuisance under this section. Ferry v. U. S. (C. C. A. Pa. 1923) 292 F. 583.

In a prosecution for violation of this section, denying a motion for a directed verdict of not guilty, made on the ground that the evidence was insufficient to show that the defendants had committed any offense, held not error. Kathriner v. U. S. (C. C. A. Cal. 1921) 276 F. 808.

41. Instructions.—On trial of defendants, respectively owner and tenant of a building, charged with maintaining a common nuisance, an instruction that, if defendants knew of violation of the law by a subtenant and failed to report it, they might be convicted, the court probably having in mind section 251 of Title 18, Criminal Code and Criminal Procedure, relating to misprision of felony, was held erroneous. Present v. U. S. (C. C. A. Ohio, 1922) 281 F. 131.

Charge on question of entrapment was held properly refused, where purchase was made by boy with marked money. Kendjerski v. U. S. (C. C. A. Ohio, 1926) 9 F.(2d) 909.

In prosecution for violating this section, in permitting customers to bring and consume intoxicating liquor on premises, instruction that employees would be guilty, even if they used reasonable diligence to prevent violations of statute, and that one who knowingly permits liquor to be trafficked in on his premises must prevent it at his peril, was held reversible error, not cured by subsequent statement that this does not apply to occasional violations. Notary v. U. S. (C. C. A. Colo. 1926) 16 F.(2d) 434.

Instruction that, though no liquor was sold nor kept on premises, defendants were guilty of violating this section, if they maintained place where liquor was kept for unlawful purpose within statute, was held conflicting and erroneous. Id.

In prosecution for maintaining a common nuisance under this section, instruction that defendant was guilty if he maintained a certain house, and knowingly had in possession intoxicating liquor for beverage purposes, was held erroneous without charge concerning purpose for which liquor was kept, and error was not cured by Const. Cal. art. 6, § 4½. People v. Fuller (1925) 238 P. 809, 73 Cal. App. 183.

42. Verdict—In general.—In a prosecution for maintaining a common nuisance, that is, a place where intoxicating liquors, were unlawfully sold, a verdict finding defendant guilty of unlawfully selling intoxicating liquors is a general verdict and not a "special verdict" which generally speaking is one in which the jury find all the facts and refer the decision on those facts to the court. Samlin v. U. S. (C. C. A. Mont. 1922) 278 F. 170.

Under section 565 of Title 18, Criminal Code and Criminal Procedure, providing that the defendant may be found guilty of any offense necessarily included in that with which he is charged a verdict convicting defendant of unlawfully selling intoxicating liquor convicts of an offense within the charge of the information that he maintained a common nuisance; that is a building where intoxicating liquor was sold in violation of this section. Id.

43. —— Conviction or acquittal of part of offenses charged.—See, also, notes to section 12 of this title.

An acquittal on the charge of selling liquor is not inconsistent with a conviction for maintaining a common nuisance by keeping a place where liquor was unlawfully kept for sale. Panzich v. U. S. (C. C. A. Cal. 1923) 285 F. 871, certiorari denied (1923) 43 S. Ct. 524, 262 U. S. 749, 67 L. Ed. 1213.

Unlawful sale of liquor and maintaining a public nuisance in violation of this section, are separate and distinct offenses, and a verdict of acquittal of the former charge is not necessarily inconsistent with a conviction of the latter, on the same evidence. Carrigan v. U. S. (C. C. A. Wis. 1923) 290 F. 189, wherein it was said:

"He could have been found guilty of either offense without having been guilty of the other. To illustrate: The jury might have found that the evidence showed the liquor sold the government witness was not intoxicating within the definition of the act, and yet, in view of

the intoxicated condition of other individuals in the barroom, coupled with the fact that liquor was sold and delivered to them while the government witness was present, have also found that the premises were being conducted as a nuisance."

Acquittal on count charging unlawful possession has been held not to invalidate conviction on count charging maintenance of nuisance. Baldini v. U. S. (C. C. A. Nev. 1923) 286 F. 133, certiorari denied (1923) 43 S. Ct. 524, 262 U. S. 749, 67 L. Ed. 1214.

An acquittal of defendant under a count charging possession of intoxicating liquor in violation of the National Prohibition Act (incorporated in this title), and an acquittal of defendant's employees of the charge of possessing intoxicating liquor, and defendant's conviction under a count charging that defendant maintained a common nuisance in violation of that act, though apparently inconsistent, is permissible. Marshallo v. U. S. (C. C. A. N. Y. 1924) 298 F. 74, wherein it was said: "It may appear inconsistent to have found the plaintiff in error guilty of maintaining a common nuisance and not to have found him guilty of possessing intoxicating liquor in violation of the act. However, we are not called upon to justify the conclusions the jury reached for the acquittal on the count of possession. It is sufficient for our determination to say that the evidence which was adduced on the trial, if believed, justified the conclusion of a violation of the act in respect to the provision making it a crime to maintain a common nuisance. Boone v. United States (Ark. 1919) 257 F. 963, 169 C. C. A. 113. It is permissible for a jury to convict on one count and acquit on the other, where it was also within their province to convict on both counts on the same evidence."

Acquittal of defendant on counts charging unlawful possession and sale of liquor on certain premises was held not inconsistent with a verdict of guilty on another count charging maintenance of a nuisance on the premises, where there was evidence that defendant owned the building and tending to show that he had knowledge that liquor was being kept and sold therein. Dallas v. U. S. (C. C. A. Minn. 1925) 4 F.(2d) 201.

Conviction for conspiring to maintain common nuisance by unlawfully selling intoxicating liquor on premises, in violation of National Prohibition Act (incorporated in this title), under one count, was held not inconsistent with acquittal for sale and possession of liquor charged in other counts. Hacker v. U. S. (C. C. A. Nev. 1925) 5 F.(2d) 132.

A verdict of acquittal on counts charging unlawful possession of liquor and property designed for manufacturing liquor, and unlawful manufacture, was held not to have force of res judicata, precluding conviction on count charging maintenance of nuisance. Gozner v. U. S. (C. C. A. Ohio, 1925) 9 F.(2d) 603.

Conviction for maintaining liquor nuisance held not invalidated by acquittal on other counts. Id.

Acquittal of charge of maintaining common nuisance within National Prohibition Act (incorporated in this title) is not acquittal of charge of unlawful possession or sale of liquor, possession or sale being separate offenses from maintaining common nuisance. Bossio v. U. S. (C. C. A. Wash. 1926) 16 F.(2d) 57, certiorari denied (1927) 47 S. Ct. 586, 71 L. Ed. ——.

44. —— Acquittal as res judicata.—Former acquittal on charge of maintaining a nuisance, in violation of this section, was held not a bar to subsequent suit in equity under section 34 of this title to abate the same alleged nuisance, since decree of abatement is not a punishment for crime involved in former acquittal. Murphy v. U. S. (1926) 47 S. Ct. 218, 272 U. S. 630, 71 L. Ed. ——.

45. Sentence and punishment.—An information charging that defendant did "unlawfully transport in a Buick automobile certain intoxicating liquor" charges the offense specifically described in section 12 of this title, for which the punishment prescribed by section 46 of this title, is a fine of not more than $500 for a first offense, and on a plea of guilty defendant cannot lawfully be sentenced to imprisonment for maintaining a common nuisance by keeping liquor in a vehicle in violation of this section. Healey v. U. S. (C. C. A. Pa. 1921) 276 F. 711; Daley v. U. S. (C. C. A. Pa. 1921) 276 F. 713; Felmun v. U. S. (C. C. A. Pa. 1921) 276 F. 713.

Under information charging unlawful possession of liquor in second count, and maintaining liquor nuisance in third count, sentence fixing punishment at fine on second count, and six months' imprisonment and fine on third count, was held at least ambiguous as to whether imprisonment was unlawfully imposed on second count, and clause as to imprisonment will be eliminated. Goode v. U. S. (C. C. A. Mo. 1926) 12 F.(2d) 742.

Fine for minor violation of National Prohibition Act (incorporated in this title), for which only punishment is fine, may not be enforced by imprisonment in penitentiary in view of this section and section 46 of this title permitting imprisonment for only one year and six months, respectively, for more serious offenses. Cahill v. Biddle (C. C. A. Kan. 1926) 13 F.(2d) 827.

A defendant, convicted on counts for "selling whisky and maintaining a common nuisance," and sentenced to be "imprisoned for the period of six months on

the first count, and * * * for the period of six months on the second count, said judgments of imprisonment to run consecutively," was held not entitled to discharge on habeas corpus, on the ground that the judgment does not specify which term of imprisonment should be served first. Ex parte Rice (D. C. Cal. 1925) 6 F.(2d) 167, affirmed Rice v. U. S. (C. C. A. 1925) 7 F.(2d) 319.

Concurrent sentence of defendant on counts for unlawful possession of whisky and for maintaining a nuisance, not in excess of that prescribed for maintaining a nuisance, need not be disturbed, though count for unlawful possession cannot stand, in that it is included in maintaining a nuisance. Schechter v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 881, certiorari denied (1925) 46 S. Ct. 21, 269 U. S. 561, 70 L. Ed. 412.

In McDonough v. U. S. (C. C. A. Cal. 1924) 299 F. 30, motion for leave to file supplemental petition for rehearing denied (C. C. A. 1924) 1 F.(2d) 147, and certiorari denied (1924) 45 S. Ct. 95, 266 U. S. 613, 69 L. Ed. 468, it was held that a fine of $1,000 and imprisonment for nine months for maintaining a liquor nuisance was not excessive.

46. Arrest of judgment.—In prosecution for maintaining liquor nuisance, refusal of motion in arrest of judgment because accused had severed connection with premises before filing of information was held not error. Brown v. U. S. (C. C. A. S. C. 1925) 6 F.(2d) 522.

47. Review—In general.—One sale or a number of sales of liquor, when regarded in connection with attendant circumstances, may or may not, in the mind of the judge, who has the responsibility of decision, determine the fact of nuisance and in reaching his decision the judge exercises his discretion, which is reviewable only for its abuse. U. S. v. Ward (C. C. A. Pa. 1925) 6 F.(2d) 182.

In prosecution and conviction for sale of intoxicating liquor, where sentence imposed is not greater than that which could have been imposed for unlawful sale alone, conviction on count for maintaining nuisance need not be reviewed. Jordan v. U. S. (C. C. A. Ga. 1924) 2 F.(2d) 598.

48. —— Prejudicial error.—Opening remarks of prosecuting attorney, in prosecution for conspiracy to violate National Prohibition Act (incorporated in this title), though unsupported by evidence, held not prejudicial, in view of court's statement. Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F.(2d) 507, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. —.

Evidence of reputation of accused's place of business, limited to nuisance charge, held not prejudicial, where accused was acquitted of such charge. Chapman v. U. S. (C. C. A. Ind. 1925) 9 F.(2d) 790.

Guilt of maintenance of liquor nuisance held not so clearly established as to render receipt of incompetent evidence nonprejudicial. Heitman v. U. S. (C. C. A. Cal. 1925) 5 F.(2d) 887.

49. —— Affirmance or reversal.—Conviction under this section affirmed. Kendjerski v. U. S. (C. C. A. Ohio, 1926) 9 F. (2d) 909; Pincolini v. U. S. (C. C. A. Nev. 1924) 295 F. 468; Piacenza v. U. S. (C. C. A. Cal. 1923) 293 F. 164; Ash v. U. S. (C. C. A. W. Va. 1924) 299 F. 277.

Conviction of maintaining common nuisance in violation of this section, reversed for error in instruction. Carney v. U. S. (C. C. A. Mont. 1924) 295 F. 606.

Conviction of maintaining a common nuisance in violation of this section reversed for erroneous admission of articles unlawfully seized and testimony as to finding them. Legman v. U. S. (C. C. A. N. J. 1924) 295 F. 474.

§ 34. Abatement of nuisance; injunction; procedure; bond by owner or lessee of building. An action to enjoin any nuisance defined in this chapter may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue, restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way inter-

fering with the liquor or fixtures, or other things used in connection with the violation of this chapter constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, structure, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this chapter upon said property. (Oct. 28, 1919, c. 85, Title II, § 22, 41 Stat. 314.)

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I. VALIDITY, CONSTRUCTION AND OPERATION

1. Constitutionality.—This section and section 33 of this title defining what shall constitute a nuisance, and conferring on courts of equity power to determine the facts and to abate such nuisances, are constitutional. U. S. v. American Brewing Co. (D. C. Pa. 1924) 1 F.(2d) 1001.

When construed as authorizing court of equity to abate the nuisance of a building used for illegal sale of liquor, and enjoin its use for a year, without trial by jury, and, so construed, they are not unconstitutional. Kling v. U. S. (C. C. A. Mich. 1925) 8 F.(2d) 730, certiorari denied (1926) 46 S. Ct. 203, 269 U. S. 587, 70 L. Ed. 426.

This section, providing for abatement of liquor nuisance, is valid. Peter Hand Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 449; Schlieder v. U. S. (C. C. A. La. 1926) 11 F.(2d) 345.

It is not unconstitutional because denying jury trial. Denapolis v. U. S. (C. C. A. La. 1925) 3 F.(2d) 722.

It is not violative of due process clause. Peter Hand Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 449.

Congress had authority, under the Eighteenth amendment, to enact this sec-

tion. U. S. v. Cohen (D. C. Mo.) 268 F. 420. It does not take property without due process of law, as the jurisdiction of equity to abate nuisances is of ancient date. Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800. It is not beyond the powers of Congress, as conferring on courts of equity power to punish persons for the commission of crime. U. S. v. Reinking (D. C. N. J. 1922) 283 F. 855.

"Obviously the permitted closing of a place which has been used for the maintenance of a nuisance, as part of the provided procedure for the abatement of such nuisance, was not intended as a punishment nor penalty for previous fault, but merely as a helpful and reasonable aid in abating the nuisance. It is clear that such remedy, accompanied and safeguarded as it is by the discretionary power in the court to apply and adapt it to the circumstances of each particular case, is both effective and just. It is a matter of common knowledge, of which this court will take judicial notice, that the existence of a nuisance of this kind involves, not only the presence of intoxicating liquor, but also the habitual presence of those who come to the premises to sell and to purchase such liquor, and who necessarily assist, and participate in, the continued maintenance of such nuisance. The usual, if not inevitable, result is that the place acquires that 'probability that the old customers will resort to the old place,' which the law recognizes, in connection with a lawful business, as 'good will.' The good will of a reputable business is valued throughout the business world. Purchasers pay thousands of dollars for this element of a legitimate business, knowing that the habits of customers in patronizing a particular institution become so fixed as to greatly enhance its value. So, when a place becomes a public nuisance because intoxicating liquor is there purchased, kept, and sold for beverage purposes, it establishes a reputation and acquires customers who will continue to frequent that location. This naturally and necessarily renders it unusually difficult to prevent further violations of the law in that place, with consequent continuation of the nuisance. It is not to be expected that an owner of premises who has already failed to prevent its use as a public nuisance will be more successful in that respect in the future, notwithstanding the entire innocence and good faith of such owner. It often happens as is perhaps true in the present case, that an owner or lessor of premises on which such a nuisance has been created (by the occupant thereof) is not personally responsible for that situation and has not contributed to, nor even had knowledge of, the acts constituting the nuisance. So that under those circumstances, and specifically in the present case, the closing of the premises is not to be considered as a reflection, in any way, upon such owner or lessor. It is not prompted by fault nor designed as punishment, but its sole purpose is to accomplish an effectual abatement of the nuisance. As already indicated, I cannot doubt that such action is a reasonable and appropriate, if not absolutely necessary, means of enforcing the constitutional power to abate a public nuisance." U. S. v. Boynton (D. C. Mich. 1924) 297 F. 261.

On the other hand it has been held that this section and section 33 of this title providing for actions in equity to abate liquor nuisances and for injunction, are intended to apply, though no nuisance exists at the date of the hearing, and are unconstitutional, because the federal government cannot put offenders against federal laws on trial except before a jury. U. S. v. Lot 29, etc. (D. C. Neb. 1924) 296 F. 729.

In U. S. v. Schwartz (D. C. Mass. 1924) 1 F.(2d) 718, the court criticised this case, saying: "On the other hand, this court cannot adopt the contention of defendant's counsel that the statute is unconstitutional. Reliance for this view is placed upon the opinion of Judge Woodrough in United States v. Lot 29, Block 16, Highland Place, City of Omaha (D. C. Neb. 1924) 296 F. 729, filed March 7, 1924, in the Omaha division of the District Court for the district of Nebraska. The statute does not seem to this court to be open to the objections that Judge Woodrough found insuperable. The fact that Congress provided a double remedy against such nuisances, making them both criminal misdemeanors and, if continuous or recurrent, subject to abatement by equity proceedings, does not seem to involve any unconstitutional criminal jurisdiction by a court of equity. Nuisances are not necessarily crimes. Congress might, if it had seen fit, have provided no criminal remedy whatever."

2. Powers of states and municipalities.—State cannot nullify provision of this section authorizing district attorney to sue to abate liquor nuisance in state court. U. S. v. Sumner (Sup. 1925) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (1926) 214 N. Y. S. 930, 216 App. Div. 782.

A city ordinance providing for the suppression as nuisances, of places used for the unlawful sale of intoxicating liquor, is properly within the police power, and is not affected by Const. U. S. Amend. 18. Lake Charles v. Rose (1921) 149 La. 647, 89 So. 884.

3. Nuisances—In general.—See, also, notes to section 33 of this title.

The "nuisance defined in this title" (now "this chapter") which may be enjoined relates to the "common nuisance" defined in section 33 of this title. U. S.

v. Auto City Brewing Co. (D. C. Mich. 1922) 279 F. 132.

It must be presumed that Congress, in enacting this section, used the word "nuisance" in its usual and ordinary legal significance, having in mind that it could not pass a law which would wipe out the constitutional rights of the citizen in private property. U. S. v. Cohen (D. C. Mo. 1920) 268 F. 420.

Roadhouse, where intoxicating liquor was consumed, held "nuisance" notwithstanding owners did not own, sell, or barter liquor. U. S. v. Budar (D. C. Wis. 1925) 9 F.(2d) 126.

What constitutes a common nuisance for the purpose of a criminal prosecution, under section 33 of this title, also constitutes a common nuisance for the purpose of an injunction suit, under this section. U. S. v. Eilert Brewing & Beverage Co. (D. C. Ohio, 1921) 278 F. 659. To constitute a place a common nuisance, which may be closed to use by injunction, under this section, its unlawful use must have been with the consent of the owner, or he must have had knowledge or reason to believe it was so used. U. S. v. Butler (D. C. N. Y. 1922) 278 F. 677. A single sale of intoxicating liquor on premises, accompanied by the unlawful possession of other liquor thereon, is sufficient to warrant the granting of an injunction under this section, for maintenance of a common nuisance. U. S. v. Eilert Brewing & Beverage Co. (D. C. Ohio, 1921) 278 F. 659. In a suit to abate a liquor nuisance, it is not necessary in all cases to prove repeated sales, in order to justify a finding of a common nuisance. Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800.

"Maintenance of nuisance" implies continuity of criminal action over substantial period of time. Webb v. U. S. (C. C. A. Mo. 1926) 14 F.(2d) 574.

4. —— Persons liable.—The landlord of a tenant, who is maintaining a liquor nuisance on the premises, cannot close his eyes to obvious facts and still plead innocence, but may be chargeable with knowledge of the use to which the premises are put, if the facts reasonably warrant such a conclusion, notwithstanding his profession of ignorance of such uses. Grossman v. U. S. (C. C. A. Ill. 1922) 280 F. 683.

5. Searches.—Officer executing search warrant has no right to commandeer claimant's building for storage of property seized, and may remain only so long as is reasonably necessary to complete search and remove property. U. S. v. 63,250 Gallons of Beer (D. C. Mass. 1926) 13 F.(2d) 242.

6. Abatement in general.—Under this section, it must appear that the sales were continuous or recurrent, since authorizing abatement for a single sale would be to authorize a suit in equity, where the legal remedy by prosecution for the sale was adequate. U. S. v. Cohen (D. C. Mo. 1920) 268 F. 420. But see Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800, holding that in a suit to abate a liquor nuisance, it is not necessary in all cases to prove repeated sales, in order to justify a finding of a common nuisance.

Ranch premises abated as common nuisance within this section. U. S. v. Williams (D. C. Mont. 1924) 295 F. 219.

A court of equity should only abate such liquor nuisances as are existing, or enjoin such as are shown to be actually threatened, and in absence of statute equity should not abate or enjoin a liquor nuisance in a house owned by husband and wife as a homestead, where one of the owners had made some wine and sold part of it, but the liquor and apparatus had been seized. U. S. v. Lot 29, etc. (D. C. Neb. 1924) 296 F. 729.

It was not an abatement of nuisance under National Prohibition Act (incorporated in this title) that defendants' property was under court's surveillance through marshal with search warrant, and that defendants were operating under special permit from the court to manufacture and dispose of certain materials. Peter Hand Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 449.

Defendants' brewery could be closed as a nuisance for violation of the National Prohibition Act (incorporated in this title), though indictments were pending against them for the same offenses. Pilsen Products Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 453.

Under National Prohibition Act (incorporated in this title), whatever means are reasonably necessary to abate nuisance may be adopted, without infringing constitutional rights, though property of innocent owner is taken or destroyed. U. S. v. Auto City Brewing Co. (D. C. Mich. 1925) 5 F.(2d) 362.

Under this section and section 33 of this title, property of innocent owner may be closed after ejectment of tenant to abate liquor nuisance. Schlieder v. U. S. (C. C. A. La. 1926) 11 F.(2d) 345.

Owner's knowledge or reason to believe that tenant was violating law on premises is not necessary to exercise of court's power to abate liquor nuisance. U. S. v. Studio Club (D. C. N. Y. 1926) 12 F.(2d) 462, modified U. S. v. Pepe (C. C. A. 1926) 12 F.(2d) 985.

Decree closing premises after nuisance is effectively abated and inference of recurrence removed by owner's ouster of tenants is unwarranted. U. S. v. Chesebrough Mfg. Co. (D. C. N. Y. 1926) 11 F. (2d) 537.

Decree of closure may be entered where landlord, although having no knowledge

that tenant was violating law, had reason to suspect such, and had taken no steps to obtain evidence to terminate lease, and particularly where business was of character that would probably result in continuous violation on premises. U. S. v. Studio Club (D. C. N. Y. 1926) 12 F.(2d) 462, modified U. S. v. Pepe (C. C. A. 1926) 12 F.(2d) 985.

7. Grounds for denying relief.—Acquittal on charge of maintaining nuisance is not bar to subsequent suit in equity to abate same nuisance. Murphy v. U. S. (U. S. 1926) 47 S. Ct. 218, 272 U. S. 630, 71 L. Ed. —; Egner v. U. S. (C. C. A. N. J. 1926) 16 F.(2d) 597.

That defendants were in possession only as lessees, and had not been previously convicted, that the premises at time of issuance of preliminary injunction were closed for repairs, and that one of defendants had acquired his interest in lease after offenses complained of, was held not to prevent abatement. Denapolis v. U. S. (C. C. A. La. 1925) 3 F.(2d) 722.

A special defense to an application for injunction, under this section to restrain the sale of intoxicating liquor, alleging a conviction and payment of fine, and that a remedy by injunction would be an additional punishment for which no trial by jury was permitted in violation of Constitution, was properly overruled, as the injunction proceeding is a civil action not involving element of punishment. U. S. v. Stevens (1925) 130 A. 249, 103 Conn. 7.

When maintenance of a nuisance, as defined in section 33 of this title, is clearly shown, the fact that its maintenance had ceased before commencement or hearing of an abatement suit will not prevent issuance of an injunction, where its abandonment was not voluntary, but was due to seizure and removal of the liquor from the premises under a search warrant within 30 days before commencement of the suit and cancellation of the permit under which defendant obtained and kept the liquor. U. S. v. Margolis (D. C. Cal. 1923) 289 F. 161.

II. PROCEDURE

21. Proceedings in general.—In proceedings under National Prohibition Act (incorporated in this title), to abate liquor nuisance, where neither party made or intended to make application to take deposition, it was not error to place case on trial calendar before time for taking and filing depositions had expired. Kandle v. U. S. (C. C. A. N. J. 1925) 4 F.(2d) 183.

The procedural features of the Volstead Act (incorporated in this title), a federal statute, are not controlling in California of their own force. Matter of Brambini (1923) 192 Cal. 10, 218 P. 569, affirmed Brambini v. U. S. (1925) 45 S. Ct. 461, 267 U. S. 584, 69 L. Ed. 799.

Tenant's right to maintain lease against landlord was gone, on breaking covenant to obey National Prohibition Law (incorporated in this title) and government, in abatement proceedings, may assist landlord to recover premises. U. S. v. Gaffney (C. C. A. N. Y. 1926) 10 F.(2d) 694.

That state statute does not provide equitable remedy for abatement of violations of National Prohibition Act (incorporated in this title) does not lessen duty of prosecutors and courts in enforcing in appropriate cases the remedy provided by this section. U. S. v. Stevens (1925) 130 A. 249, 103 Conn. 7.

"Padlock proceedings" under this section are a cloud on the title, justifying a refusal to complete a contract for the purchase of the premises. Goldstein v. Ehrlick (1924) 96 N. J. Eq. 52, 124 A. 761.

Equity rules promulgated by Supreme Court under sections 637 and 730 of Title 28, Judicial Code and Judiciary, have force and effect of law and are applicable to cases brought under National Prohibition Act (incorporated in this title) for abatement of liquor nuisances. Kandle v. U. S. (C. C. A. N. J. 1925) 4 F.(2d) 183.

22. Nature and form of remedy.—Proceeding to restrain maintenance of liquor nuisance, under this section, is a civil and not a criminal proceeding. State v. Froelich (1925) 146 N. E. 733, 316 Ill. 77.

Under this section, government has right to abate nuisance by suit in equity, notwithstanding it has remedy at law by criminal prosecution. Denapolis v. U. S. (C. C. A. La. 1925) 3 F.(2d) 722.

A suit to enjoin a nuisance, brought under this section is not transferable to the law side of the court. U. S. v. American Brewing Co. (D. C. Pa. 1924) 1 F.(2d) 1001.

A suit to enjoin a nuisance, under this section, deals, not with a forbidden act of sale, but with a place of forbidden character. U. S. v. Ward (C. C. A. Pa. 1925) 6 F.(2d) 182.

A suit in equity to abate a nuisance, under this Act, is a suit in personam, and not one in rem against the property as the offender. U. S. v. Schwartz (D. C. Mass. 1924) 1 F.(2d) 718.

23. Who may bring suit.—Under this section, a state prosecuting attorney may institute an action to enjoin a nuisance as defined in section 33 of this title in the state courts which have concurrent jurisdiction with federal courts to abate such nuisances. U. S. v. Stevens (1925) 130 A. 249, 103 Conn. 7.

Action to have premises abated as liquor nuisance under federal statute was properly brought by district attorney of county in which alleged nuisance was located. U. S. v. Myers (1926) 214 N. Y. S. 438, 215 App. Div. 624.

24. Jurisdiction.—It was unnecessary for Congress to confer jurisdiction on a court of equity to abate nuisances and to restrain individuals from maintaining

them, or to punish for violation of its restraining order, as was done by this section, since federal courts of equity exercised such jurisdiction long before the adoption of this section, and equity rules applicable to federal court practice apply to equity suits under this section, unless some contrary provision is found therein. Grossman v. U. S. (C. C. A. Ill. 1922) 280 F. 683.

Under the Eighteenth Amendment, § 2, providing that Congress and the several states shall have concurrent jurisdiction to enforce this article by appropriate legislation, and this section, providing that an action to enjoin a nuisance may be brought in the name of the United States in any court having equity jurisdiction, and the state Constitution, giving the superior court jurisdiction of actions to prevent or abate a nuisance, the superior court of San Diego county, had jurisdiction to try a case brought by the district attorney in the name of the United States to enjoin a nuisance, as defined by this act. Carse v. Marsh (1922) 210 P. 257, 189 Cal. 743.

State courts, in absence of state prohibition, may determine for themselves whether their duty requires them to assume jurisdiction of suits in equity to abate liquor nuisance. Ex parte Gounis (1924) 263 S. W. 988, 304 Mo. 428.

Circuit Court of St. Louis county had full jurisdiction of an action prosecuted in name of United States under this section and sections 33 and 38 of this title, to restrain a place where liquor was sold as a public nuisance. Id.

That state has expressly refused to pass legislation to enforce the National Prohibition Act (incorporated in this title), does not deprive state court of jurisdiction of action by federal officers to abate a liquor nuisance. U. S. v. Sumner (Sup. 1925) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (1926) 214 N. Y. S. 930, 216 App. Div. 782.

In proceedings by government against landlord and tenant to abate liquor nuisance, under this section and section 33 of this title, court had jurisdiction of landlord's cross-bill against tenant to cancel lease because of forfeiture under section 37 of this title. U. S. v. Duignan (C. C. A. N. Y. 1925) 4 F.(2d) 983, affirmed Duignan v. U. S. (1927) 47 S. Ct. 566, 71 L. Ed. —.

25. Time for bringing suit.—Time for bringing suit for abatement is not limited to 60 days. Kennedy v. U. S. (C. C. A. Nev. 1925) 4 F.(2d) 486.

26. Abatement of proceedings.—A suit by the United States to abate a liquor nuisance instituted by the Attorney General of the state was abated by the pendency of prior suit by the United States government to abate such nuisance brought by the United States district attorney. Shore v. U. S. (C. C. A. Ill. 1922) 282 F. 857.

27. Parties.—On bill to abate liquor nuisance, all persons whose right, title, or interest may be affected by granting relief sought are proper parties. U. S. v. Gaffney (C. C. A. N. Y. 1926) 10 F.(2d) 694.

Under this section, proceedings may be instituted against tenant. Schlieder v. U. S. (C. C. A. La. 1926) 11 F.(2d) 345.

In a suit to abate a nuisance conducted by the tenant the owner of the premises has such an interest as to entitle him to intervene and file a cross-complaint for affirmative relief. U. S. v. Boynton (D. C. Mich. 1924) 297 F. 261. The court said: "Is it proper practice for the interveners to file a cross-complaint for affirmative relief against other defendants? As already noted, the National Prohibition Act, in section 23 of title 2 [section 37 of this title], provides that: 'Any violation of this title upon any leased premises by the lessee or occcupant thereof shall, at the option of the lessor, work a forfeiture of the lease.'

"It is also there provided that an action to enjoin a nuisance under the statute 'shall be brought and tried as an action in equity.' It is settled equity practice to permit a defendant in a suit to seek relief against another defendant in such suit with respect to a matter germane to the subject thereof. The practice is recognized in general equity rule 30 [set out under section 723 of Title 28, Judicial Code and Judiciary], providing that: 'The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit.'

"In the present case the very facts relied on by the plaintiff in support of the decree sought by it might also entitle the interveners to the relief prayed by them. The situation renders the right to set up the cross-complaint in question peculiarly applicable and appropriate. Grossman v. United States (C. C. A. Ill. 1922) 280 F. 683.

"Such practice enables the government and the innocent lessor of premises used as a nuisance under the National Prohibition Act [incorporated in this title] to co-operate to the advantage of both. In the one suit, the existence of the nuisance (if any) may be proved, the good faith of the lessor established, the nuisance which offends both the government and such lessor abated (by the closing of the premises for a sufficient period to accomplish that result), the lease which has enabled the tenant to commit such nuisance may be terminated, such tenant removed, and the premises restored to the possession and control of such lessor, subject to his giving the bond prescribed by the National Prohibition Act. It may

not be amiss to state in this connection that the present policy of this court in this respect is not to permit the opening of premises so closed prior to the expiration of the statutory period, unless the court is first satisfied that such premises will not be used for the purpose of selling soft drinks, and will not be occupied by any person who is not a citizen of the United States, or who has been convicted of any felony or misdemeanor under the laws of any city, state, or country within the preceding five years."

28. Pleading—In general.—A bill for the abatement as a nuisance of a place wherein intoxicating liquor is kept for unlawful sale, should allege facts which show that the legal remedy by prosecution under that act is inadequate to protect the rights of the public; otherwise, the proceeding, in which defendant is not entitled to a trial by jury, either before the injunction is issued or in proceedings to punish for contempt, under section 38 of this title, and section 389 of Title 28, Judicial Code and Judiciary, might deprive defendant of his right to a trial by jury, guaranteed by Const. Amend. 6. The bill need not allege that the sales therein were in interstate commerce. U. S. v. Cohen (D. C. Mo. 1920) 268 F. 420.

In a suit for an injunction abating a liquor nuisance, where the complaint described the location of the nuisance with particularity, and fully and fairly set forth the connection of the various defendants therewith, it was unnecessary to allege that one of such defendants had been prosecuted and convicted of a similar criminal offense; it being the purpose of the statute to supply a more prompt, effective, and efficient means of abating nuisances than the institution of criminal actions. Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800.

A bill for an injunction to close a place as a nuisance under this section must allege specifically what violation of the statute was committed therein, and it is not sufficient to allege in the disjunctive that liquor was manufactured, sold, kept, or bartered on the premises. The bill must set forth the facts which constitute the nuisance, and if the sale of liquor in the premises is alleged it must appear that it was sold, kept, or bartered habitually, continually, or recurrently, and a general allegation that liquor has been and is being sold and kept for sale therein is insufficient. A bill is insufficient to authorize the granting of a temporary injunction, where the allegations are made on information and belief. U. S. v. Butler (D. C. N. Y. 1922) 278 F. 677.

A bill of complaint for an injunction under this section is not defective because of the failure of a typist to insert the name of the affiant in the verification of the bill where it appears that the affiant signed such verification and swore to it. Weiss v. U. S. (C. C. A. Ill. 1922) 283 F. 785, certiorari denied (1922) 43 S. Ct. 97, 260 U. S. 739, 67 L. Ed. 490.

In proceeding against corporation and its officers and agents to abate nuisance under National Prohibition Act (incorporated in this title), the officers and agents admitted they were in active control by failure to deny such fact, under federal equity rule No. 30 (set out under section 723 of Title 28, Judicial Code and Judiciary). Peter Hand Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 449.

Where acts constituting a nuisance under the National Prohibition Act (incorporated in this title), were charged and proved in proceeding to close brewery as nuisance, failure to charge operation without permit was immaterial. Pilsen Products Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 453.

Bill to abate liquor nuisance in substantially language of this section, held not indefinite or uncertain. Denapolis v. U. S. (C. C. A. La. 1925) 3 F.(2d) 722.

29. —— Cross-bills.—In liquor nuisance abatement proceedings, owner's cross-bill for forfeiture of tenant's lease held to involve right under United States law. Duignan v. U. S. (N. Y. 1927) 47 S. Ct. 566, 71 L. Ed. ——, affirming U. S. v. Duignan (C. C. A. 1925) 4 F.(2d) 983.

30. —— Amendments.—In proceeding to close brewery as a nuisance for violation of National Prohibition Act (incorporated in this title), allowance of amendment to bill alleging violation of Prohibition Act, after filing of bill, similar to that originally charged, and admission of evidence thereunder, held not error; effect thereof being merely to show a continuation of the nuisance. Pilsen Products Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 453.

31. —— Proof and variance.—In suit to abate liquor nuisance, material allegations of bill must be proved, in order to support decree. Mickewicz v. U. S. (C. C. A. N. J. 1925) 4 F.(2d) 48.

Fact that bill in equity for maintaining nuisance, as defined by this section alleged date on one day, while proof showed it was day following, was held not error, in absence of any showing of injury. Kniskern v. U. S. (C. C. A. N. J. 1926) 13 F.(2d) 845.

32. Evidence—In general.—Provision that, in nuisance abatement proceedings, court need not find that property is being unlawfully used is mere rule of evidence. U. S. v. Chesebrough Mfg. Co. (D. C. N. Y. 1926) 11 F.(2d) 537.

The provision of section 35 of this title, that proof of intention to continue violation of the act shall not be necessary if action to enjoin nuisance is brought within

60 days following any such violation, applies only to proceedings brought under that section, and not to abatement proceedings under this section. Kennedy v. U. S. (C. C. A. Nev. 1925) 4 F.(2d) 486.

In a suit under National Prohibition Act (incorporated in this title), for abatement of a nuisance, a finding by the court that sales of liquor on the premises, shown to have been frequent four months before the suit was commenced, continued to that time, was held not error as matter of law because based on proof as to the general atmosphere of the place, its location, fittings, furnishing, patrons, and attendants. Id.

33. —— Presumptions and burden of proof.—Where a purchaser of liquor, on entering the place of sale, inquired the price of whisky, put his money on the bar, and asked for whisky, and was given a beverage by defendant, it is presumed that he received what he ordered and paid for. Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800.

It suit to abate liquor nuisance, a nuisance once shown to exist will be presumed to continue. Shore v. U. S. (C. C. A. Ill. 1922) 282 F. 857.

In proceeding to abate nuisance under National Prohibition Act (incorporated in this title), defendants, claiming right to manufacture under government permit, had burden of proving that they had a permit, and that the liquor manufactured, sold, or withdrawn contained less than one-half of 1 per cent. of alcohol by volume, in view of sections 58 to 60 of this title. Peter Hand Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 449.

Burden held on owners of roadhouse to show abatement of nuisance after raid by federal prohibition agents. U. S. v. Budar (D. C. Wis. 1925) 9 F.(2d) 126.

34. —— Admissibility.—Evidence as to continuance of acts productive of liquor nuisance after filing bill for abatement is admissible. U. S. v. Gaffney (C. C. N. Y. 1926) 10 F.(2d) 694.

So in proceeding under this section, to abate an alleged continuing nuisance, evidence of sales of liquor subsequent to filing of bill held properly admitted to prove the continuing character of the nuisance, though competent only after antecedent facts alleged had been proved. Murphy v. U. S. (C. C. A. N. J. 1926) 16 F. (2d) 595, certified questions answered (1926) 47 S. Ct. 218, 272 U. S. 630, 71 L. Ed. —.

In proceedings to abate liquor nuisance, testimony by prohibition officer as to facts brought to his mind for the first time by a memorandum made by another has been held not evidence which could be considered by the court. U. S. v. Keppler (C. C. A. N. J. 1924) 1 F.(2d) 315.

35. —— Sufficiency.—Evidence held to establish the allegation that defendant maintained a common nuisance on premises by the manufacture and sale of intoxicating liquor thereon, which rendered them subject to injunction and abatement, under this section. U. S. v. Eilert Brewing & Beverage Co. (D. C. Ohio, 1921) 278 F. 659.

In proceeding to abate nuisance under National Prohibition Act (incorporated in this title), in which defendant corporation claimed the right to manufacture near beer and to dealcoholize real beer under government permit, evidence held to prove knowledge of corporation's officers of violations of act. Peter Hand Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 449.

Evidence held to show sale. Id.

Evidence held insufficient to show defendant's right to manufacture under government permit. Id.

Evidence establishing sales and possession of intoxicating liquor on premises held sufficient to sustain decree abating liquor nuisance. Denapolis v. U. S. (C. C. A. La. 1925) 3 F.(2d) 722.

In proceedings to close brewery as nuisance for violation of National Prohibition Act (incorporated in this title), evidence as to sale of real beer held to sustain finding that nuisance would be continued, if opportunity permitted. Pilsen Products Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 453.

Evidence of large quantity of liquor in hotel and prior conviction of lessee held sufficient to establish maintenance of liquor nuisance, warranting abatement. U. S. v. Archibald (D. C. N. Y. 1925) 4 F. (2d) 587.

In suit to abate nuisance, under this section and section 33 of this title, finding that a common nuisance was maintained on premises in question held sustained by evidence. Casey v. U. S. (C. C. A. N. J. 1925) 8 F.(2d) 709.

Evidence held to warrant injunction against landlord in proceeding under this section to abate liquor nuisance on leased premises. U. S. v. Pepe (C. C. A. N. Y. 1926) 12 F.(2d) 985, modifying U. S. v. Studio Club (D. C. 1926) 12 F.(2d) 462.

Suit to enjoin nuisance is governed by rule of equity as to measure of proof required. Rettig Beverage Co. v. U. S. (C. C. A. Pa. 1926) 13 F.(2d) 740.

Evidence held sufficient to support decree adjudging premises a common nuisance, as defined by section 33 of this title. Kniskern v. U. S. (C. C. A. N. J. 1926) 13 F.(2d) 845; Capawana v. U. S. (C. C. A. N. J. 1923) 294 F. 153.

Finding that intoxicating liquor was possessed and sold on premises held warranted, authorizing injunction to re-

strain nuisance. U. S. v. Myers (1926) 214 N. Y. S. 438, 215 App. Div. 624.

36. Trial—In general.—Issues in action in New York to enjoin liquor nuisance are triable in any county in judicial district. U. S. v. Myers (1926) 214 N. Y. S. 438, 215 App. Div. 624.

Defendant, whose place government witness testifies informer pointed out as liquor nuisance, is not entitled to have name of informer disclosed. Mitrovich v. U. S. (C. C. A. Or. 1926) 15 F.(2d) 163.

A defendant in a suit to abate a nuisance under this section, who testified without objection when called by the government to prove that he owned the property, and afterwards testified in his own behalf, cannot complain that he was subjected to penalties and forfeitures in reference to matters in which he had been called to testify. Capawana v. U. S. (C. C. A. N. J. 1923) 294 F. 153.

37. —— Jury trial.—Under this section and section 33 of this title, court of equity has power to abate the nuisance of a building used for illegal sale of liquor, and enjoin its use for a year, without trial by jury. Kling v. U. S. (C. C. A. Mich. 1925) 8 F.(2d) 730, certiorari denied (1926) 46 S. Ct. 203, 269 U. S. 587, 70 L. Ed. 426.

Defendant, in proceedings by the United States to abate liquor nuisance under this section and section 33 of this title, is not entitled to a trial of issue of nuisance before a jury. U. S. v. Duignan (C. C. A. N. Y. 1925) 4 F.(2d) 983, affirmed Duignan v. U. S. (1927) 47 S. Ct. 566, 71 L. Ed. ——.

It has been held that defendants are not entitled to a trial by a jury either upon a hearing of a suit to abate and enjoin, or upon a trial of any contempt which may grow out of a violation of any injunction which may be granted. U. S. v. Cohen (D. C. Mo. 1920) 268 F. 420.

Defendant tenant in liquor nuisance abatement proceedings was held not improperly denied jury trial of issues raised on owner's cross-bill for forfeiture of lease. Duignan v. U. S. (N. Y. 1927) 47 S. Ct. 566, 71 L. Ed. ——, affirming U. S. v. Duignan (C. C. A. 1925) 4 F.(2d) 983.

38. —— Findings.—In suit to abate nuisance, the court's directions for a decree for complainant necessarily involved a finding that a nuisance was being maintained at the commencement of the suit, notwithstanding express finding as to maintenance of nuisance on specified date prior thereto. Shore v. U. S. (C. C. A. Ill. 1922) 282 F. 857. To same effect, see Reynolds v. U. S. (C. C. A. Ill. 1922) 282 F. 860; Salvo v. U. S. (C. C. A. Ill. 1922) 282 F. 861; Kinateder v. U. S. (C. C. A. Ill. 1922) 282 F. 861.

It has been held that a finding by the court that the owner had knowledge of the unlawful use of premises adjudged a nuisance is not a condition precedent to an order closing the place for one year. U. S. v. Boynton (D. C. Mich. 1924) 297 F. 261, the court saying: "In the exercise of its authority, and in compliance with the duty imposed upon it by the Eighteenth Amendment, to enforce such amendment 'by appropriate legislation,' Congress has declared that any place where intoxicating liquor is unlawfully manufactured, sold, kept, or bartered is a public nuisance, and has made suitable provisions for the abatement of such a nuisance in proper legal proceedings. One of the means adopted by Congress as advisable and appropriate for the accomplishment of that object is permissive authority in a proper court of equity to order that the place of location of the offending nuisance 'shall not be occupied or used for one year thereafter,' unless such court, in its discretion, shall permit such place to be occupied or used 'if the owner, lessee, tenant, or occupant thereof shall give bond' as prescribed in the statute already quoted. This power to 'padlock' a place which has thus become a public nuisance is not made dependent upon a finding of knowledge or notice, on the part of any owner of such a place, of the existence of such nuisance. (Whether Congress could have limited the exercise by a court of equity of its inherent power to enforce its orders in the abatement of a nuisance, is a question which need not be considered.) But the power is expressly granted by Congress to the court in very broad terms. The only conditions attempted to be attached to its exercise are a finding that the nuisance exists and a judgment 'ordering such nuisance to be abated.' The language of the statute is plain and unambiguous in this respect, and this court cannot read into such language a condition or qualification not there expressed, such as a finding of guilty knowledge on the part of an owner of affected premises. To restrict this broadly granted power of abatement by adding such a condition, not prescribed by Congress, would be to indulge in judicial legislation, beyond the jurisdiction of this court."

39. Injunction—In general.—Under this section, a temporary injunction may be issued, where it is shown that the illegal sales have been made at the place complained of as a nuisance, for which defendant is now under arrest, and that such sales had also been made at the same place since the arrest. U. S. v. Schott (D. C. Pa. 1920) 265 F. 429.

The specific provisions of this section, relative to temporary and permanent injunctions against liquor nuisances, prevail over any general statute or court rule limiting the time during which a temporary restraining order granted ex

parte, may remain in force. Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800.

Within this section, authorizing the court, in a suit to have property declared a liquor nuisance, to issue a temporary injunction restraining any interference with the liquor or fixtures used in connection with the violation of the act, the word "liquor" refers to intoxicating liquor. The purpose of the temporary injunction against removal of liquor and fixtures on premises used in violation of the statute, was to preserve the status quo, so that a subsequent order directing the sale of the property, as authorized by section 33 of this title, might be carried out. The authority given by this section, to issue a temporary order restraining the defendants from removing or interfering with liquor or fixtures used in violation of the act, does not authorize a temporary injunction restraining the defendants from exercising any control over the property. U. S. v. Auto City Brewing Co. (D. C. Mich. 1922) 279 F. 132.

The express authority given by this section, to issue temporary injunctions for the purposes therein stated, impliedly excludes the authority to issue such injunctions under the inherent powers of the court in any other cases. Id.

An injunctional order prohibiting the manufacture or sale of intoxicating liquor on premises described does not prohibit the manufacture of near beer, containing less than the prohibited percentage of alcohol, though at one stage of the process the percentage was greater, the excess being afterward extracted. McFarland v. U. S. (C. C. A. Ill. 1924) 295 F. 648.

Personal injunction against subtenant in proceedings to abate liquor nuisance was held proper, though facts did not warrant closing of premises. U. S. v. Chesebrough Mfg. Co. (D. C. N. Y. 1926) 11 F.(2d) 537.

A bar or counter in a place where intoxicating liquors are sold is a "fixture," and rooms used in connection with bar, and opening into it, for purpose of obtaining access to bar by bartender are "other things" used in connection with violation of this section, and hence may be closed by temporary injunction. U. S. v. Myers (Sup. 1925) 211 N. Y. S. 465, 125 Misc. Rep. 556.

40. —— Proceedings to obtain injunction.—In view of this section relating to issuance of temporary injunction to restrain maintenance of liquor nuisance, notice required by equity rule 73 (set out under section 723 of Title 28, Judicial Code and Judiciary) and section 381 of Title 28, is not necessary. Druggan v. Anderson (1925) 46 S. Ct. 14, 269 U. S. 36, 70 L. Ed. 151; McFarland v. U. S. (C. C. A. Ill. 1924) 295 F. 648.

And temporary injunction to restrain liquor nuisance, issued without notice, even if notice in such cases be required by equity rule 73 (set out under section 723 of Title 28, Judicial Code and Judiciary) and section 381 of Title 28, cannot be disregarded as void. Druggan v. Anderson (Ill. 1925) 46 S. Ct. 14, 269 U. S. 36, 70 L. Ed. 151.

Though, in a suit to abate a liquor nuisance, it was not proper practice to serve a writ of injunction, instead of the injunctional order, on a defendant, where the writ signed by the clerk contained all the recitals of the order of injunction and the order abating the nuisance, and fully and completely apprised defendant of the contents of the restraining order, he could not, when charged with contempt in violating such order, assert ignorance of its contents. Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800.

An order entered in proceedings by the United States brought by the United States district attorney enjoining a liquor nuisance is a bar to a similar order in a suit subsequently instituted on behalf of the United States by the Attorney General of the state against the same defendants for the same relief and based on the same facts, so that a judgment in the second proceeding is void and does not sustain a commitment for contempt. McGovern v. U. S. (C. C. A. Ill. 1922) 280 F. 73, certiorari denied (1922) 42 S. Ct. 464, 259 U. S. 580, 66 L. Ed. 1073.

On motion for preliminary injunction under this section to abate a nuisance it cannot be made to appear "to the satisfaction of the court" that the nuisance exists by affidavits alone, where the acts charged are explicitly denied by counter affidavits. U. S. v. Zukauckas (D. C. Pa. 1923) 293 F. 756.

"The intent and meaning of the language 'by affidavits or otherwise' is that the parties may produce evidence otherwise than by affidavits; that is to say, by the calling of witnesses or production in evidence of documentary or other exhibits properly proved at the hearing." U. S. v. Zukauckas (D. C. Pa. 1923) 293 F. 756.

Copy of officer's return showing service of injunction order on accused held sufficient evidence of service. Welling v. U. S. (C. C. A. Mich. 1925) 9 F.(2d) 292.

A bill charging liquor violations in building and ownership in defendant, etc., held to bring the case within the in rem proceeding against property provided for in this section and section 33 of this title but not within the provisions of section 35 of this title, and court did not have power to enter a personal injunction

against defendant, though such injunction was prayed. Capawana v. U. S. (C. C. A. N. J. 1923) 294 F. 153.

41. —— Violations.—Where, in an abatement suit against a brewery under this section, the court enjoined manufacture or sale therein in violation of law, but permitted the corporation owner to continue its operation on giving bond to comply with the order, the officers and directors of the company are responsible for the subsequent lawful conduct of the business and liable for contempt for violation of the injunction. Westmoreland Brewing Co. v. U. S. (C. C. A. Pa. 1923) 294 F. 740, affirming U. S. v. Westmoreland Brewing Co. (D. C. 1923) 294 F. 735, certiorari denied Westmoreland Brewing Co. v. U. S. (1924) 44 S. Ct. 231, 263 U. S. 722, 68 L. Ed. 525.

An injunction issued for abatement of a nuisance under this section, whether or not accompanied by a closing order is not perpetual, but is deemed to have effected its purpose at the expiration of one year, and a subsequent sale of liquor in the premises is not punishable as a contempt for violation of the injunction. Webb v. U. S. (C. C. A. Mo. 1926) 14 F.(2d) 574.

An injunction for abatement of a nuisance, issued under this section, is not violated by a single sale of liquor on the premises, unaccompanied by any act showing continuity, as the keeping of liquor on the premises, and which would be insufficient to constitute a nuisance in the first instance. Id.

A defendant permanently enjoined from maintaining a liquor nuisance, under this section, may be adjudged in contempt for violation of such injunction, though no written notice of temporary injunction was given him. State v. Droelich (Ill. 1925) 146 N. E. 733, 316 Ill. 77.

Owner of soft drink stand could not be convicted of violating injunction against sale, on assumption of his continued interest in place. Welling v. U. S. (C. C. A. Mich. 1925) 9 F.(2d) 292.

42. —— Proceedings to punish violations.—Contempt of court for the violation of an injunction restraining a liquor nuisance bears no necessary relation to liability for violating a criminal statute, though both are incurred by the same act, and punishment for one is no bar to prosecution for the other. The court said: "Whether the contempt be regarded as civil or criminal in its nature, the punishment imposed is nevertheless in vindication of the court's authority, which has been defied through violation of the injunctional order. If courts were deprived of compulsory or punitive power in the enforcement of their lawful orders, their injunction would be mere brutum fulmen. If a decree is for the payment of money, the scire facias makes it effective; but if it is for the doing or refraining from specified things, the power to proceed in contempt for the willful flouting of its injunctional order is the vital spark which alone makes the order efficacious. Contempt of court for transgression of its injunctional order bears no necessary relation to liability for violating a criminal statute, although both are incurred by the same act, and punishment for one is no bar to prosecution for the other." Hanse v. U. S. (C. C. A. Ill. 1924) 1 F.(2d) 316.

Information held sufficient to charge sale of intoxicating liquor in violation of injunction order. Welling v. U. S. (C. C. A. Mich. 1925) 9 F.(2d) 292.

Information charging contempt need not specifically allege service of injunction order on accused. Id.

Denial of new trial to one adjudged in contempt and fined for violation of injunction pendente lite, sought on ground that principal witness against defendant was in fact unable to recognize him at times involved, was held not abuse of discretion. Winston v. U. S. (1926) 13 F.(2d) 297, 56 App. D. C. 325.

43. —— Evidence.—Conviction of former saloon employees for contempt in violating injunction issued under this section prohibiting selling or storing intoxicating liquor on premises for one year, was unwarranted, in absence of any evidence of their participation. Fryar v. U. S. (C. C. A. Tenn. 1925) 3 F.(2d) 598.

Evidence held to warrant conviction of owner of saloon for contempt in violating injunction issued under this section, prohibiting selling or storing intoxicating liquor on premises for one year. Id.

An order adjudging defendants in contempt for violation of an injunction restraining them as managers of a brewery permitted to be operated by the court, pending a suit against it as a nuisance, from manufacturing or removing therefrom intoxicating liquor, held fully sustained by the evidence. Keystone Brewing Co. v. U. S. (C. C. A. Pa. 1925) 3 F. (2d) 994, certiorari denied (1925) 45 S. Ct. 509, 268 U. S. 689, 69 L. Ed. 1158, and certiorari denied, Napolitano v. U. S. (1925) 46 S. Ct. 18, 269 U. S. 553, 70 L. Ed. 408.

Innocence of violating injunction against sale of liquor is presumed, until guilt is proved beyond reasonable doubt. Welling v. U. S. (C. C. A. Mich. 1925) 9 F.(2d) 292.

Evidence held not to show violation of injunction against sale by one accused. Id.

44. Decree.—In a suit under this section to abate a nuisance conducted by a tenant, the intervening owner of the premises, who was without knowledge of or acquiescence in their unlawful use, may obtain affirmative relief by a cancellation of the lease under section 37 of this title, as against a lessee shown to have participated in or to have had guilty knowl-

edge of such use by a subtenant. U. S. v. Boynton (D. C. Mich. 1924) 297 F. 261.

Although, in suit for abatement of liquor nuisance, no notice of lis pendens, as required by state statute, was filed, lessees acquiring interest after final decree and without notice of abatement suit held not entitled to be relieved from decree, which merely affected use of land for a time, in view of this section, and section 724 of Title 28, Judicial Code and Judiciary, providing that practice in equity in federal courts need not conform to practice in state courts. U. S. v. Olzak (D. C. N. J. 1925) 6 F.(2d) 1014.

Decree closing premises after nuisance is effectively abated and inference of recurrence removed by owner's ouster of tenants is unwarranted. U. S. v. Chesebrough Mfg. Co. (D. C. N. Y. 1926) 11 F. (2d) 537.

Law authorizing abatement of liquor nuisance is solely for abating existing nuisance, and decree should be addressed to rights existing, not at time suit began, but at time of its determination. U. S. v. Studio Club (D. C. N. Y. 1926) 12 F.(2d) 462, modified U. S. v. Pepe (C. C. A. 1926) 12 F.(2d) 985.

Padlock decree of federal court, entered pro confesso, was held binding in landlord's summary proceeding on tenant not named, but admitting it conducted business. Broadway Central Securities Corporation v. Buchanan Restaurant Co. (1926) 218 N. Y. S. 539, 218 App. Div. 594.

Federal padlock decree, entered pro confesso, established that demised premises were used for illegal business, giving landlord right to recover in summary proceeding. Id.

45. —— Dismissal.—Although the affidavits may be insufficient as a matter of law to warrant a temporary injunction a motion to dismiss should not be sustained where the bill is sufficient to justify the issuance of an injunction after a final hearing. U. S. v. Cohen (D. C. Mo. 1920) 268 F. 420. The court further said:

"In short, the affidavits seem to go to the authority of the court to issue a temporary injunction, and, the bill being sufficient, these affidavits have no bearing upon the authority of the court, after a final hearing, to perpetually enjoin."

In a suit to enjoin a nuisance, under this section, the fact that the judge was "satisfied" on the showing made at the preliminary hearing that a nuisance was maintained, and granted a preliminary injunction, does not deprive him of the power to dismiss the bill in his discretion on final hearing, on a finding that its averments have not been proved. U. S. v. Ward (C. C. A. Pa. 1925) 6 F.(2d) 182.

46. —— Opening default.—In proceedings, to abate liquor nuisance, opening default to permit infants claiming interest in premises to intervene and defend was held not required, in view of rule that owner of premises is not necessarily party, and particularly not if continued unlawful sales on premises were established, notwithstanding contemplated sale of premises in pending partition action in state court. U. S. v. Lento (D. C. N. Y. 1925) 8 F.(2d) 432.

47. —— Use of premises in general.—This section, construed in connection with sections 33 and 35 to 37 of this title, does not authorize the closing for a year of a building as a common nuisance because of the illegal manufacture or sale of liquor therein by a tenant, when the owner had no knowledge or reason to believe that the building was being so illegally used. U. S. v. Schwartz (D. C. Mass. 1924) 1 F.(2d) 718, wherein the court said: "Construing these statutes together, and in the light of their obvious purpose, the government's contention that under section 22 [this section] the court may, and in cases like the present should, order the premises to be padlocked against any use for a year, seems to me untenable. It is unnecessary to discuss whether Congress has constitutional power to impose such a penalty on an innocent owner. We have, of course, a considerable number of illustrations of liability without fault, as under Workmen's Compensation Acts; the sale of milk below standards (G. L. Mass. c. 94, § 18); so as to property used in revenue frauds. Goldsmith Grant Co. v. United States (Ga. 1921) 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376; R. S. sec. 3450 (sections 1181, 1182 of Title 26, Internal Revenue).

"The general rule at common law is the other way—that persons innocent of actual or imputed wrongdoing shall not be penalized either criminally or in the civil courts. The construction of section 22, contended for by the government, would frequently result in depriving an entirely innocent owner of premises of any use or income from his property for most, if not all, of a year, because the nuisance creating tenant would frequently be merely a tenant at will, and, if put out of business, financially irresponsible. Only very plain language would warrant a construction so unjust and so inconsistent with elementary principles as to property rights.

"Moreover, the provision in section 21 [section 33 of this title] making the premises of the owner liable to fines only in case the owner has knowledge or reason to believe that his premises are being used for nuisance purposes makes strongly against the contention that Congress intended by section 22 [this section] to provide that the innocent owner might find his premises padlocked for a year without having had knowledge and a re-

sultant opportunity to abate the nuisance—a penalty that frequently would cost the owner much more than a large direct fine. If knowledge or reason to believe is requisite in order to make premises responsible for the fines imposed upon the creator of the nuisance, a fortiori, knowledge or reason to believe is a condition precedent to the imposition of the drastic punishment of padlocking the premises for a year."

Where petition to reopen brewery, which had operated without a permit and had been closed as a nuisance for violation of the National Prohibition Act (incorporated in this title), merely offered to pay all fines, costs, and damages for any violation, and did not state that premises would be put to different use, and where record in abatement proceeding warranted finding that nuisance would be continued if opportunity permitted, denial thereof would not have been abuse of discretion. Pilsen Products Co. v. U. S. (C. C. A. Ill. 1924) 2 F.(2d) 453.

Premises closed as a nuisance will not be permitted to be occupied. U. S. v. Thomas (D. C. Cal. 1925) 4 F.(2d) 857.

48. —— Recovery of premises under bond.—Where a decree has been entered pursuant to this section, finding that a building as used was a common nuisance and closing it from occupancy for one year, its use will not be permitted on a subsequent application by the owner and his giving bond. U. S. v. Thomas (D. C. Cal. 1925) 4 F.(2d) 857.

Whether owner be permitted to use premises after giving bond against violations of National Prohibition Act (incorporated in this title) is within discretion of trial court but trial court may not arbitrarily deny innocent owner right to give bond and recover possession of property unlawfully used by tenant. Schlieder v. U. S. (C. C. A. La. 1926) 11 F.(2d) 345.

Refusal to permit innocent owners of property used in violation of Prohibition Act (incorporated in this title) to give bond and recover possession held abuse of discretion. Id.

Evidence held to require that decree for abatement of nuisance provide for stay of injunction as to landlord on his giving of bond. U. S. v. Pepe (C. C. A. N. Y. 1926) 12 F.(2d) 985, modifying U. S. v. Studio Club (D. C. 1922) 12 F.(2d) 462.

In application for an injunction to restrain the sale of intoxicating liquors, evidence held sufficient to warrant order in exercise of a judicial discretion, permitting use of premises upon bond given by defendant as provided in this section. U. S. v. Stevens (1925) 130 A. 249, 103 Conn. 7.

49. Review.—In a suit to abate liquor nuisance, a decree for the government will not be reversed, though the finding as to the maintenance of the nuisance related to a time prior to the commencement of the action, and there was no finding as to existence of nuisance at time of commencement of action, but the Circuit Court of Appeals will view the evidence and determine for itself whether nuisance existed at time the action was commenced. Shore v. U. S. (C. C. A. Ill. 1922) 282 F. 857.

Where decree of court in pursuance of this section, enjoining a nuisance, provided that the defendant or any person claiming under him could petition the court for a permit to open and occupy, on giving bond, etc., appeals of one becoming owner after the institution of the suit and of previous mortgagees will be dismissed, where they did not avail themselves of leave given to petition the trial court for relief. Capawana v. U. S. (C. C. A. N. J. 1923) 294 F. 153.

Where record on appeal from decree abating liquor nuisance did not show what evidence, if any, before court was secured by use of alleged illegal search warrant, and where there was other evidence sufficient to warrant decree, invalidity of warrant, if conceded, did not require reversal. Denapolis v. U. S. (C. C. A. La. 1925) 3 F.(2d) 722.

In abatement proceedings against landlord and tenant, under this section and section 33 of this title, where landlord filed cross-bill for cancellation of lease, because of forfeiture thereof under section 37 of this title and tenant tried case without denying, by any pleading, jurisdiction of cross-bill, tenant cannot, on appeal, raise question of jurisdiction. U. S. v. Duignan (C. C. A. N. Y. 1925) 4 F.(2d) 983, affirmed Duignan v. U. S. (1927) 47 S. Ct. 566, 71 L. Ed. ——.

In suit to abate a nuisance, under this section and section 33 of this title, admission of evidence procured unlawfully under search warrants was not ground for reversal, where other competent evidence was sufficient to support decree. Casey v. U. S. (C. C. A. N. J. 1925) 8 F.(2d) 709.

Appeal in suit to abate liquor nuisance brings up whole case, both on facts and law, for review. Schlieder v. U. S. (C. C. A. La. 1926) 11 F.(2d) 345.

Whether owner be permitted to use premises after giving bond against violations of National Prohibition Act (incorporated in this title) is within discretion of trial court but his judgment is reviewable on appeal. Id.

Assignment of error that "the court erred in not entering judgment in favor of the defendants and against the complainant," in proceedings to abate liquor nuisance, was held bad. Egner v. U. S. (C. C. A. N. J. 1926) 16 F.(2d) 597.

Exceptions will be dismissed on Su-

preme Court's own motion, where no written motion for appeal was filed as required by G. L. Vt. 1561, within 20 days from date of decretal order for injunction under National Prohibition Act, tit. 2 (incorporated in this title). United States v. Cano (Vt. 1926) 135 A. 1.

50. Costs.—Under Code Cr. Proc. N. Y. § 953, and section 547 of Title 18, Criminal Code and Criminal Procedure, place where intoxicating liquors are sold in violation of Volstead Act (incorporated in this title), is "public nuisance," and person maintaining it is guilty of misdemeanor, under Penal Law N. Y. § 1530, and courts may direct abatement of such nuisance, with costs to be paid by defendant. U. S. v. Sumner (1925) 211 N. Y. S. 705, 125 Misc. Rep. 658, affirmed (1926) 214 N. Y. S. 930, 216 App. Div. 782.

51. Proceedings as evidence or res judicata.—Record of proceeding by United States in federal court against tenants and undertenants, wherein, as result of stipulation withdrawing answers, decree pro confesso was entered, declaring business carried on in premises to be common nuisance, within National Prohibition Act (incorporated in this title), and enjoining the manufacture, sale, and barter of intoxicating liquor on premises, was competent evidence in landlord's proceeding for possession on ground of illegal use of premises; stipulation withdrawing answers constituting admission against interest. Pullman Holding Co. v. Restaurant Crillon (Sup. 1925) 211 N. Y. S. 301, 125 Misc. Rep. 748.

Padlock decree by federal court, entered pro confesso, for selling intoxicating liquor on demised premises, in violation of National Prohibition Act (incorporated in this title), and stipulation withdrawing answer, did not constitute res judicata, nor admissions, available in summary proceeding under N. Y. Civil Practice Act, § 1410, subd. 5, to recover possession of premises, on ground they were being used for illegal purposes against parties not named in federal proceedings. Broadway Central Securities Corporation v. Visalia Restaurant Co. (Sup. 1925) 211 N. Y. S. 445, 125 Misc. Rep. 464.

And such decree entered pro confesso, and stipulation, even if sufficient to establish violation of National Prohibition Act (incorporated in this title), were not sufficient to establish landlord's right to recover possession of demised premises, in summary proceeding under Civil Practice Act, § 1410, subd. 5, on ground that premises were used for illegal business. Id.

§ 35. Person keeping or carrying liquor with intent to sell, or soliciting orders for liquor guilty of nuisance and restrainable by injunction. Any person who shall, with intent to effect a sale of liquor, by himself, his employee, servant, or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or other conveyance whatever, or leave in a place for another to secure, any liquor, or who shall travel to solicit, or solicit, or take, or accept orders for the sale, shipment, or delivery of liquor in violation of this title is guilty of a nuisance and may be restrained by injunction, temporary and permanent, from doing or continuing to do any of said acts or things.

In such proceedings it shall not be necessary to show any intention on the part of the accused to continue such violations if the action is brought within sixty days following any such violation of the law. (Oct. 28, 1919, c. 85, Title II, § 23, 41 Stat. 314.)

Cross-References

The portions of the original text of this section omitted here are incorporated in sections 36 and 37 of this title.

Notes of Decisions

1. Statute as not creating crime.—This section, making traveling to solicit orders for liquor a nuisance, without making act misdemeanor or fixing penalty, was not intended to make act crime, but remedy by injunction provided therein is exclusive, in view of different language of section 33 of this title, and penalty provided by section 46 of this title cannot be applied. U. S. v. Seibert (D. C. W. Va. 1924) 2 F.(2d) 80.

2. Possession of liquor as offense.—Possession of liquor in one's dwelling is not unlawful under this section. U. S. v. Maag (D. C. Pa. 1923) 287 F. 356.

3. Injunction—Sufficiency of bill.—A bill charging liquor violations in building and ownership in defendant, etc., was held to bring the case within the in rem proceeding against property provided for in sections 33 and 34 of this title, but not within the provisions of this section, and

court did not have power to enter a personal injunction against defendant, though such injunction was prayed. Capawana v. U. S. (C. C. A. N. J. 1923) 294 F. 153.

4. Proof of intention.—The provision of this section that proof of intention to continue violation of the act shall not be necessary if action to enjoin nuisance is brought within 60 days following any such violation, applies only to proceedings brought under this section, and not to abatement proceedings under section 34 of this title. Kennedy v. U. S. (C. C. A. Nev. 1925) 4 F.(2d) 486.

5. Decree.—Law authorizing abatement of liquor nuisance is solely for abating existing nuisance, and decree should be addressed to rights existing, not at time suit began, but at time of its determination. U. S. v. Studio Club (D. C. N. Y. 1926) 12 F.(2d) 462, modified U. S. v. Pepe (C. C. A. 1926) 12 F.(2d) 985.

6. Record as evidence in other case.—Padlock decree in federal court for selling intoxicating liquor in violation of this section and section 33 of this title, entered pro confesso, and stipulation for withdrawal of answer therein even if sufficient to establish violation of National Prohibition Act (incorporated in this title), were not sufficient to establish landlord's right to recover possession of demised premises, in summary proceeding under Civil Practice Act, N. Y. § 1410, subd. 5, on ground that premises were used for illegal business. Broadway Central Securities Corporation v. Visalia Restaurant Co. (Sup. 1925) 211 N. Y. S. 445, 125 Misc. Rep. 464.

§ 36. Fees of officers. For removing and selling property in enforcing this chapter the officer shall be entitled to charge and receive the same fee as the sheriff of the county would receive for levying upon and selling property under execution, and for closing the premises and keeping them closed a reasonable sum shall be allowed by the court. (Oct. 28, 1919, c. 85, Title II, § 23, 41 Stat. 314.)

Cross-References

The portions of the original text of this section omitted here are incorporated in sections 35 and 37 of this title.

§ 37. Forfeiture of lease at option of lessor. Any violation of this chapter upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease. (Oct. 28, 1919, c. 85, Title II, § 23, 41 Stat. 314.)

Notes of Decisions

1. Validity.—This section is valid. Burke v. Bryant (1925) 283 Pa. 114, 128 A. 821. The court said: "Contracts which may indirectly or incidentally be concerned with matters coming within the field of prohibition legislation must be construed as having been executed with the possibility of such legislation in view. Therefore, the provisions of these acts apply to the present contract, making the violation thereof a cause for forfeiture. Moreover, the constitutional prohibition against the impairment of the obligation of contracts does not apply to the federal government. The forfeiture of leases, where the premises have been used in violation of the liquor laws, is a valid exercise of the police power as being an aid to prohibition. It has a direct effect on the enforcement of the law."

2. Forfeiture of lease.—This section is applicable to contract making violation thereof a cause for forfeiture of lease. Burke v. Bryant (1925) 128 A. 821, 283 Pa. 114.

Under this section a single violation of act is sufficient to declare forfeiture of lease. Id.

Cause of forfeiture arises when unlawful relation is shown to exist and a conviction is unnecessary. Id.

The tenant is responsible for the acts of his subtenant irrespective of scienter. Id.

3. Remedies of landlord in general.—A lessor, suing to enforce a forfeiture of a lease by an action of ejectment, was not required to plead the statute. Farrelly v. Wells (Sup. 1921) 189 N. Y. S. 34, 115 Misc. Rep. 632.

4. Cross-bill by landlord.—Equity may grant forfeiture of tenant's lease on owner's cross-bill, in proceedings for abatement of liquor nuisance. Duignan v. U. S. (N. Y. 1927) 47 S. Ct. 566, 71 L. Ed. —, affirming decree U. S. v. Duignan (C. C. A. 1925) 4 F.(2d) 983.

In such proceedings, owner's cross-bill for forfeiture of tenant's lease involves right under United States law. Id.

In liquor nuisance abatement proceedings, tenant's failure to demand common-law jury trial of owner's cross-bill for cancellation of lease was a waiver of right. Id.

Defendant tenant in liquor nuisance abatement proceedings held not improperly denied jury trial of issues raised on owners' cross-bill for forfeiture of lease. Id.

In abatement proceedings against landlord and tenant, under sections 33 and 34 of this title where landlord filed cross-bill for cancellation of lease, because of forfeiture thereof under this section and tenant tried case without denying, by any pleading, jurisdiction of cross-bill, tenant cannot, on appeal, raise question of jurisdiction. Id.

In a suit brought against a tenant and his landlords to abate a liquor nuisance a cross-complaint by the landlords, seeking a forfeiture of the lease under this section is germane to the subject-matter of the bill, and can be maintained, if the landlords are innocent of the wrongdoing of their tenant. Grossman v. U. S. (C. C. A. Ill. 1922) 280 F. 683.

5. Summary proceeding by landlord.—A lessor may not during the term of a lease invoke a state statute, providing for summary proceedings before a justice of the peace to oust a lessee who refuses to vacate the premises on the expiration of his term and after having received three months' notice to quit, on the ground that the lessee has forfeited the lease by a violation of this section. Steiner v. Central Trust, etc., Co. (1922) 274 Pa. 341, 118 A. 221.

6. —— Effect of federal decree.—Record of proceeding by United States in federal court against tenants and undertenants, wherein, as result of stipulation withdrawing answers, decree pro confesso was entered, declaring business carried on in premises to be common nuisance, and enjoining the manufacture, sale and barter of intoxicating liquor on premises, was competent evidence in landlord's proceeding for possession on ground of illegal use of premises; stipulation withdrawing answers constituting admission against interest. Pullman Holding Co. v. Restaurant Crillon (1925) 211 N. Y. S. 301, 125 Misc. Rep. 748.

Federal padlock decree, entered pro confesso, established that demised premises were used for illegal business, giving landlord right to recover in summary proceeding. Broadway Central Securities Corporation v. Buchanan Restaurant Co. (1926) 218 N. Y. S. 539, 218 App. Div. 594.

Padlock decree of federal court, entered pro confesso, was binding in landlord's summary proceeding on tenant not named, but admitting it conducted business. Id.

§ 38. Violation of injunction as contempt; procedure; punishment. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this chapter, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filling* with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment. (Oct. 28, 1919, c. 85, Title II, § 24, 41 Stat. 315.)

* "filling" should be "filing."

Notes of Decisions

See, also, notes to section 34 of this title.

1. Validity.—The provision of this section authorizing a court of equity to summarily try and punish a defendant for contempt for violation of an injunction restraining continuance of a nuisance, is constitutional and valid. Wedel v. U. S. (C. C. A. Cal. 1924) 2 F.(2d) 462.

This section does not take property without due process of law, as the jurisdiction of equity to abate nuisances is of ancient date. Nor does it violate the double jeopardy provisions of the Constitution, though the commission of the acts condemned also authorizes criminal prosecutions. Nor is it unconstitutional, because denying the right of trial by jury. Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800.

2. Proceedings to obtain injunction.—See, also, notes to section 34 of this title.

Circuit Court of St. Louis County had

full jurisdiction of an action prosecuted in name of United States under this section and sections 33 and 34 of this title, to restrain a place where liquor was sold as a public nuisance. Ex parte Gounis (1924) 263 S. W. 988, 304 Mo. 428.

3. Violations in general.—Defendants adjudged guilty of criminal contempt. U. S. v. Westmoreland Brewing Co. (D. C. Pa. 1923) 294 F. 735, affirmed Westmoreland Brewing Co. v. U. S. (C. C. A. 1923) 294 F. 740, certiorari denied (1924) 44 S. Ct. 231, 263 U. S. 722, 68 L. Ed. 525.

Contempt of court for violation of injunction restraining liquor nuisance bears no necessary relation to liability for violating a criminal statute, though both are incurred by the same act, and punishment for one is no bar to prosecution for the other. Hansen v. U. S. (C. C. A. Ill. 1924) 1 F.(2d) 316.

One not a party to suit brought under sections 34 to 37 of this title, and this section, and without knowledge of the injunctional order issued in such suit, is not guilty of contempt for violation of such order. Galligan v. U. S. (C. C. A. Ill. 1922) 282 F. 606.

Though, in a suit under sections 33 and 34 of this title, and this section, to abate a liquor nuisance, it was not proper practice to serve a writ of injunction, instead of the injunctional order, on a defendant, where the writ signed by the clerk contained all the recitals of the order of injunction and the order abating the nuisance, and fully and completely apprised defendant of the contents of the restraining order, he could not, when charged with contempt in violating such order, assert ignorance of its contents. Lewinsohn v. U. S. (C. C. A. Ill. 1922) 278 F. 421, certiorari denied (1922) 42 S. Ct. 463, 258 U. S. 630, 66 L. Ed. 800.

In a contempt proceeding under this section to punish a defendant for violation of an injunctional order restraining him from maintaining a common nuisance, he cannot object that the bill for the injunction was insufficient, since he was required to obey the injunctional order regardless of the sufficiency of the bill. Allen v. U. S. (C. C. A. Ill. 1922) 278 F. 429, wherein the court said:

"It is objected that the bill filed does not properly charge that a public nuisance was being conducted on the premises. Where the court has jurisdiction over the subject-matter, the measure of the required observance of a temporary injunctional order is not the bill filed, but the injunctional order itself. To this the defendant in the action must yield obedience, regardless of whether or not a cause of action is technically or sufficiently stated by the bill. If the bill is not sufficient, defendant may move to dismiss it, or may move to dissolve the temporary injunction issued under it. Here the bill was answered."

Where the court in a suit under section 34 of this title, against a brewery enjoined the manufacture or sale therein in violation of law, but permitted the corporation owner to continue its operation on giving bond to comply with the order, the officers and directors of the company are responsible for the subsequent lawful conduct of the business and liable for contempt for violation of the injunction. Westmoreland Brewing Co. v. U. S. (C. C. A. Pa. 1923) 294 F. 740, certiorari denied (1924) 44 S. Ct. 231, 263 U. S. 722, 68 L. Ed. 525.

4. Proceedings to punish violations in general.—Filing copy of restraining order, and making it part of information for contempt for violation thereof, was held sufficient showing of defendant's notice. Orban v. U. S. (C. C. A. Mich. 1927) 18 F.(2d) 374.

Proceedings for contempt to enforce an order abating a liquor nuisance, under section 34 of this title, are criminal contempt proceedings. McGovern v. U. S. (C. C. A. Ill. 1922) 280 F. 73, certiorari denied (1922) 42 S. Ct. 464, 259 U. S. 580, 66 L. Ed. 1073.

Where two proceedings for contempt were brought under this section against the same party and were based on the same state of facts, an order in one proceeding was a bar to a similar order in the second and a failure to plead the pendency of another contempt proceeding in the same court, between the same parties and before the same judge, was not fatal to the defendant's right to insist upon not more than a single punishment for the commission of a single offense. Id.

5. Information or complaint.—Information held sufficient to charge sale of intoxicating liquor in violation of injunction order. Welling v. U. S. (C. C. A. Mich. 1925) 9 F.(2d) 292.

6. Complaint.—Complaint in contempt proceedings for violation of injunctional order issued in equity suit, brought under sections 34 to 37 of this title, and this section, reciting that affiant saw liquor sold on certain date at the defendant's place of business, and that he had been informed that the defendant had sold such premises after the issuance of restraining order on a specified date, a date prior to that on which he had stated that he had seen liquor sold, was held insufficient, since the sale of liquor took place after the sale of the premises, and the sale of the premises was not in itself a violation of the injunction. Galligan v. U. S. (C. C. A. Ill. 1922) 282 F. 606.

Where affiant signed and swore to the verification to a complaint in contempt proceedings for violating an injunction order obtained under section 34 of this

title, the typist's failure to insert the name of the affiant in the verification did not vitiate the complaint. Weiss v. U. S. (C. C. A. Ill. 1922) 283 F. 785, certiorari denied (1922) 43 S. Ct. 97, 260 U. S. 739, 67 L. Ed. 490.

7. Evidence.—In proceeding for contempt for violation of an injunction restraining violation of National Prohibition Act (incorporated in this title), fact that record did not show the injunctional order was introduced in evidence was held not to invalidate judgment where it was treated by both parties as being before the court. Rossi v. U. S. (C. C. A. Colo. 1923) 293 F. 896.

Innocence of violating injunction against sale of liquor is presumed, until guilt is proved beyond reasonable doubt. Welling v. U. S. (C. C. A. Mich. 1925) 9 F.(2d) 292.

So owner of soft drink stand could not be convicted of violating injunction against sale, on assumption of his continued interest in place. Id.

Evidence held not to show violation of injunction against sale by one accused. Id.

In Allen v. U. S. (C. C. A. Ill. 1922) 278 F. 429, a writ of error was prosecuted from an order of the District Court finding the plaintiff in error guilty of contempt in a proceeding under this section. He objected that, upon the hearing of the contempt charge, the original bill and answer and other files, including affidavits filed with the bill, were admitted in evidence. In overruling such objection, the court said:

"Evidently the primary purpose of these was to show that there was an action pending, and that plaintiff in error had been served with an injunctional order. This was, of course, not improper or erroneous. There was no error in admitting the affidavits. They had no bearing on the issue of contempt. The affidavits were of facts whereon the injunctional order was issued. The issue in the contempt proceeding was the violation of the injunctional order, and had reference only to occurrences after the injunction had issued. Surely the court, which without jury tried the cause, was not confused or misled by these affidavits, which evidently were admitted, not as proof of the irrelevant allegations therein, but only as a part of the moving papers in the cause."

Contempt by violation of an injunction under the National Prohibition Act (incorporated in this title), enjoining the sale of intoxicating liquor on premises described in the injunctive order is established by testimony of sales after the issuance of the injunction by the defendant to the witnesses on premises bearing the name by which defendant was commonly known, and which were identified as those described in the bill for injunction and in the writ by a witness who had been on the premises and was familiar with their location, although such witness could not identify the premises by metes and bounds, and was uncertain of the section and township in which they were located, and of the location of the corners of such premises. U. S. v. Schoeben (1922) 226 Ill. App. 44.

8. New trial.—Denial of new trial to one adjudged in contempt and fined for violation of injunction pendente lite, sought on ground that principal witness against defendant was in fact unable to recognize him at times involved, was held not abuse of discretion. Winston v. U. S. (1926) 13 F.(2d) 297, 56 App. D. C. 325.

9. Judgment.—Judgment in contempt proceeding for violating liquor injunction was held not bar to prosecution for selling liquor. Orban v. U. S. (C. C. A. Mich. 1927) 18 F.(2d) 374.

A judgment of contempt, imposing a fine and imprisonment for a definite term for violation of an injunction granted under section 34 of this title, restraining maintenance of a common nuisance, was criminal in its nature and abated by the death of the defendant. Pino v. U. S. (C. C. A. Ill. 1922) 278 F. 479.

A judgment convicting a defendant of contempt for violating an order abating a liquor nuisance abates on the death of the defendant subsequent to the entry of the judgment, and a writ of error to review the judgment will be dismissed as to such defendant. McGovern v. U. S. (C. C. A. Ill. 1922) 280 F. 73, certiorari denied (1922) 42 S. Ct. 464, 259 U. S. 580, 66 L. Ed. 1073.

§ 39. **Unlawful possession of liquor or property designed for manufacture thereof; search warrants.** It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in sections 434 to 454, and 456 of Title 17,* and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so

unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process. (Oct. 28, 1919, c. 85, Title II, § 25, 41 Stat. 315.)

* "sections 434 to 454, and 456 of Title 17" should be "sections 611 to 631, and 633, of Title 18."

Historical Note

Prior to its incorporation into the Code, the second sentence of this section provided that a search warrant might issue "as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917." The provisions of Act June 15, 1917, c. 30 (public law number 24), Title XI (with the exception of section 22, which did not relate to search warrants) are incorporated in sections 611 to 631, and 633, of Title 18, Criminal Code and Criminal Procedure.

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I. VALIDITY AND OPERATION IN GENERAL

1. Constitutionality.—Const. U. S. Amend. 18, conferred on Congress power to make possession of intoxicating liquors for beverage purposes a criminal offense, as was done by this section and other sections of this title. Riggs v. U. S. (C. C. A. W. Va. 1926) 14 F.(2d) 5, certiorari denied (1926) 47 S. Ct. 110, 71 L. Ed. ——.

It is within the power of Congress to make the possession of intoxicating liquor a crime, though possessed for some purpose other than use as a beverage. Hovermale v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 586.

It was within the power of Congress to impose a penalty for possessing a still, as it did by this statute and to continue to enforce the existing heavier penalties for possessing such still without registering it and for making a mash for distillation outside an authorized distillery, thus imposing different penalties upon acts which were made separate offenses, though they were all parts of one connected transaction. U. S. v. De Large (D. C. Neb. 1921) 269 F. 820.

2. Laws repealed.—See, also, notes to sections 3 and 52 of this title.

Under the Alaska Bone Dry Law, enacted by Congress in 1917, there was no limitation upon the search of private dwellings as such. In this section, it is provided, that "no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purposes such as a store, shop, saloon, restaurant, hotel, or boarding house." To that extent the National Prohibition Act (incorporated in this title) repeals the Alaska Bone Dry Law and the Alaska Code in respect to searches and seizures in private dwellings. U. S. v. Olson (1922) 6 Alaska, 571.

This section, making it unlawful to possess any liquor or property designed for the manufacture of liquor intended for use in violation of this chapter, since it imposed a penalty for the same act as section 281 of Title 26, Internal Revenue, making it a crime to set up a still not registered with the collector of internal revenue, and section 307 of Title 26, Internal Revenue, forbidding the making of a mash fit for production of distilled liquors on premises not authorized as a distillery, repealed those two sections. U. S. v. Staff (D. C. Mo. 1920) 268 F. 417, affirmed (1923) 43 S. Ct. 197, 260 U. S. 477, 67 L. Ed. 358.

Section 1185 of Title 26, Internal Revenue, providing for the seizure and forfeiture of goods, merchandise, etc., found in any person's possession or control for the purpose of being sold or removed in fraud of the internal revenue laws, or with design to avoid payment of taxes, is repealed as applied to intoxicating liquors for beverage purposes by this section and section 46 of this title. U. S. v. 2,000 Cases of Whisky, 25 Barrels of Whisky, and 253 Barrels of Wine (C. C. A. N. Y. 1921) 277 F. 410.

Section 404 of Title 26, Internal Revenue, forbidding the concealing of untaxed liquor, was not impliedly repealed by this section, and section 33 of this title. U. S. v. Turner (D. C. Va. 1920) 266 F. 248.

The provisions of the customs laws (section 736 of Title 28, Judicial Code and Judiciary and section 483 of Title 19, Customs Duties) providing that every vehicle carrying merchandise subject to duty or unlawfully imported shall be subject to seizure and forfeiture, etc., have been repealed, in so far as they related to intoxicating liquors imported into the United States for beverage purposes, by this section. U. S. v. One Hudson Touring Car (D. C. Mich. 1921) 274 F. 473, affirmed, U.

S. v. Federal Ins. Co. (C. C. A. 1922) 284 F. 821.

The provisions of the customs statutes for forfeiture of vehicles used in lawful importations, as applied to intoxicating liquors and their containers, are repealed by this section, and section 40 of this title. U. S. v. One Packard Motor Truck (D. C. Mich. 1922) 284 F. 394.

This section and sections 12 and 46 of this title do not, and were not intended to, cover violations of section 293 of Title 26, Internal Revenue, and hence it is not repealed by section 52 of this title. Bullock v. U. S. (C. C. A. Ky. 1923) 289 F. 29.

3. Property rights in liquor.—Prior to enactment of National Prohibition Act (incorporated in this title), whisky was recognized as property. Kistenmacher v. Travelers' Indemnity Co. (Mo. App. 1925) 273 S. W. 125.

One who is in possession of liquor contrary to this act has no property rights in the liquor. People v. Case (1922) 190 N. W. 289, 220 Mich. 379, 27 A. L. R. 686.

War-time Prohibition Act (temporary) did not undertake to destroy title to whisky purchased in violation of its provisions, but provided penalty therefor, but National Prohibition Act, commonly called Volstead Law (incorporated in this title), prohibited title being taken to whisky procured or attempted to be procured in unlawful manner. Kistenmacher v. Travelers' Indemnity Co. (Mo. App. 1925) 273 S. W. 125.

Under the provisions of section 50 of this title that the possession of liquor by one not legally permitted shall be prima facie evidence that it is being kept for the purpose of disposition in violation of the act, and this section, that no property rights shall exist in liquor so kept, the unlawful owner may not reclaim the liquors by virtue of his title, but must succeed, if at all, because of the violation of his possession. Gallagher v. U. S. (C. C. A. N. Y. 1925) 6 F.(2d) 758.

Clauses of the federal statute, declaring that intoxicating liquor is not property, are police regulations to protect government officers in exercise of their duties, and, as between private persons, there may be property in liquor despite such provisions until government has taken proceedings to confiscate it. Gouch v. Republic Storage Co. (1925) 211 N. Y. S. 433, 125 Misc. Rep. 791.

It has been held in California that liquor is not lawful property and is not the subject of larceny, and hence it is not burglary to enter a building with intent to take therefrom liquor manufactured for unlawful sale after the enactment of the Volstead Act (incorporated in this title). People v. Spencer (1921) 201 P. 130, 54 Cal. App. 54.

But in other states the decisions are to the contrary. Thus it has been held that although whisky has no market value under this act except where it is purchased and kept under a government permit, yet it has an actual value and may be the subject of larceny. People v. Wilson (1921) 298 Ill. 257, 131 N. E. 609, wherein it was said:

"Burglary may be committed where personal property which is the subject of ownership is taken, and the fact that the property is kept for an unlawful purpose does not change the nature of the crime. This has been decided as to intoxicating liquors kept for sale contrary to the provisions of a statute, or property used for gambling purposes contrary to law, or a pistol the sale of which was forbidden. State v. May (1866) 20 Iowa, 305; Bales v. State (1868) 3 W. Va. 685; Commonwealth v. Smith (1880) 129 Mass. 111; Osborne v. State (1903) 115 Tenn. 717, 92 S. W. 853, 5 Ann. Cas. 797, 17 R. C. L. 29. The whisky had an actual value, whether it had a market value or not, and was the subject of larceny."

The provision of this section that "no property rights shall exist in liquor illegally possessed" is not intended to license theft of such liquor but solely to protect government officials in the exercise of their duties. It is merely a police regulation adopted to aid the enforcement of the prohibition law and to be applied with that end in view. Accordingly, whisky, having an inherent value, may be the subject of larceny even though it is held illegally at the time of the theft. People v. Otis (1923) 235 N. Y. 421, 139 N. E. 562, affirming (1921) 200 App. Div. 852, 191 N. Y. S. 944. And in a prosecution for larceny of whisky, an instruction that the whisky was property is proper, since under certain circumstances it may be possessed and owned even under this Act. State v. Friedman (1922) 120 A. 8, 98 N. J. Law, 577, affirmed (N. J. 1923) 120 A. 9, 98 N. J. Law, 577; State v. Schoonover (1922) 122 Wash. 562, 211 P. 756.

Contraband liquors may be subject of robbery, regardless of constitutional and statutory provisions that there shall be no property rights therein. Lout v. State (Okl. Cr. App. 1926) 244 P. 818.

An indictment charging larceny of a quantity of whisky is not defective because it contains no allegation that the whisky was lawfully possessed under this Act. State v. Friedman (1922) 120 A. 8, 98 N. J. Law, 577, affirmed (1923) 120 A. 9, 98 N. J. Law, 577.

4. Arrests.—Under this section and other sections of this title, prohibition officer had power to arrest defendants, engaged in manufacturing liquor, after entry through premises not occupied by defendant. Rouda v. U. S. (C. C. A. N. Y. 1926) 10 F.(2d) 916.

II. CRIMINAL OFFENSES

11. Offenses in general.—Conviction for manufacture as bar to prosecution for possession of property designed to manufacture. See annotation under section 12 of this title.

Though section 12 of this title prescribes no penalty for the unlawful possession of intoxicating liquor, such possession is punishable under section 46 of this title, imposing a penalty of a fine of not more than $500 for the violation of any of the provisions of the act for which a special penalty is not prescribed, so that the remedy for unlawful possession is not restricted to the seizure and destruction of the liquor under this section. Page v. U. S. (C. C. A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S. Ct. 461, 258 U. S. 627, 66 L. Ed. 799.

Rev. Codes Mont. 1921, § 11070, prohibiting possession of liquor or property designed for manufacture of liquor, and providing that no property right shall exist in any such liquor or property, being identical with this section, was held to charge "a crime or public offense," and not to apply only to proceedings in rem against contraband articles. State v. Gardner (Mont. 1926) 249 P. 574.

Conviction of defendant for possession, either of still or alcohol, cannot be sustained merely because he was present and participated in manufacture of intoxicating liquors. De Gregorio v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 295.

Offense of "possessing property designed for unlawful manufacture of intoxicating liquor," defined by this section, means unlawful custody and control, and more than mere physical presence. Patrilo v. U. S. (C. C. A. Mo. 1925) 7 F.(2d) 804.

Mere employees of one engaged in unlawfully manufacturing intoxicating liquor were held not in joint possession and control with their employer of equipment used, so as to be guilty, under this section, of possession of property designed for unlawful manufacture of intoxicating liquor. Id.

The unlawful keeping of liquor for sale on premises of defendant may constitute the separate offenses of unlawful possession within this section and maintaining a common nuisance. Singer v. U. S. (C. C. A. N. J. 1923) 288 F. 695.

The words "property designed for the manufacture of liquor" are broad enough to include a still and distilling apparatus whether set up or not, and mash, wort, and wash. U. S. v. Puhac (D. C. Pa. 1920) 268 F. 392.

The provision of this section that "it shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used" prohibits the possession of either liquor or property designed for the manufacture of liquor, which liquor or property was intended to be used by the possessor in violation of this act. U. S. v. Horton (D. C. Ala. 1922) 282 F. 731. It applies to liquor purchased in February, 1919, but not in the purchaser's dwelling at the time the Eighteenth Amendment went into effect, and the ownership of which was not reported to the Commissioner without 10 days thereafter, under National Prohibition Act, Title II, § 33 (incorporated in part in section 50 of this title). Fitzhugh v. Mitchell (D. C. Cal. 1922) 277 F. 966. It does not make it unlawful to possess liquor in one's dwelling. U. S. v. Crossen (D. C. Pa. 1920) 264 F. 459; Tacon v. U. S. (C. C. A. La. 1921) 270 F. 88. And this is true though the dwelling is used in part for business purposes by a person other than the possessor; and hence a wife's possession is lawful, though her husband is conducting a saloon in part of the premises. U. S. v. Crossen (D. C. Pa. 1920) 264 F. 459. It does not make unlawful possession in a storage warehouse by one who intends to use the liquor in his own home for his family and guests, which is permitted by section 50 of this title. Street v. Lincoln Safe Deposit Co. (N. Y. 1920) 41 S. Ct. 31, 254 U. S. 88, 65 L. Ed. 151, 10 A. L. R. 1548, reversing (D. C. 1920) 267 F. 706.

Assuming that this section, prohibiting the possession of property designed for the manufacture of liquor intended for unlawful use, includes such possession for purpose of sale, there could be no conviction on a count under this section, and also on a count under section 30 of this title, relative to possession for sale, where the evidence showed conclusively that possession was for purpose of sale only, and not for defendant's own use in manufacturing liquors. Rossman v. U. S. (C. C. A. Ohio, 1922) 280 F. 950.

Under section 12 of this title, prohibiting the transportation of intoxicating liquor for beverage purposes, except as therein authorized, and providing that the law shall be liberally construed to prevent the use of intoxicating liquor as a beverage, intoxicating liquor cannot be transported from a bonded warehouse to the owner's residence, notwithstanding this section and section 50 of this title, prohibiting warrants to search private dwellings and declaring it not unlawful to possess liquors in one's private dwelling for the personal consumption of the owner, his family, and bona fide guests, and the proviso of section 12, permitting the purchase and sale of warehouse receipts for liquors in bonded warehouses, as a bonded warehouse cannot be regarded as a mere convenience contributory to the dwelling. Cornell v. Moore (Mo. 1922) 42 S. Ct. 170, 257 U. S. 491, 66 L. Ed. 332, affirming (D. C. 1920) 267 F. 456.

It is unlawful under this section to have intoxicating liquors in one's possession, unless under permit, on premises used partly as a saloon and partly as a dwelling. U. S. v. Maag (D. C. Pa. 1923) 287 F. 356.

Possession of liquor in one's home is not unlawful under this section. State v. Helms (1921) 181 N. C. 566, 107 S. E. 228, following Street v. Lincoln Safe Deposit Co. (N. Y. 1920) 254 U. S. 88, 41 S. St. 31, 65 L. Ed. 151, 10 A. L. R. 1548.

It has been held that possession of articles designed for manufacture of intoxicating liquors is, under the National Prohibition Act (incorporated in this title) a distinctive offense from that of manufacturing. Klein v. U. S. (C. C. A. R. I. 1926) 14 F.(2d) 35.

But in another case it was held that the offense of possessing property designed for unlawfully manufacturing intoxicating liquor, under this section, is included in offense of unlawful manufacture, and defendants, convicted of offense of unlawful manufacture, cannot, under same evidence, be convicted and punished for possession of property designed for unlawfully manufacturing liquor. Patrilo v. U. S. (C. C. A. Mo. 1925) 7 F.(2d) 804.

"The exception applies to the building or to the part of a building that is used and occupied by the person who is in possession of such intoxicating liquor. If all of the building or the part exclusively occupied by such person is used as a dwelling only, then such possession is not unlawful, although other persons may conduct in some other part of the same building, a store, shop, saloon, restaurant, hotel, or boarding house." Rose v. U. S. (C. C. A. Ohio, 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed. 419.

12. Indictment and information.—Indictment for unlawfully possessing parts of outfit designed for unlawful manufacture of spiritous liquors need not aver intent. Baker v. Commonwealth (1926) 283 S. W. 437, 214 Ky. 472.

Indictment for subsequent offenses of possession of intoxicating liquor need not negative facts making possession lawful. Biddle v. Hays (C. C. A. Kan. 1925) 8 F. (2d) 937.

An indictment charging that defendants "unlawfully and knowingly did possess certain intoxicating liquors" described was held insufficient to charge an offense. Hilt v. U. S. (C. C. A. Fla. 1922) 279 F. 421.

An information charging defendant with "unlawful" possession of intoxicating liquors was held sufficient to state an offense under this section. U. S. v. Everson (D. C. Fla. 1922) 280 F. 126.

Where counts for having possession of property designed for the manufacture of intoxicating liquor intended for use in violation of this section, and for unlawful possession for sale of a utensil intended and designed or intended for use in unlawful manufacture in violation of section 30 of this title, further described the property and utensil as a still and distilling apparatus, the words "distilling apparatus" could not be limited to a completed still fully equipped and ready for operation, but might cover a 15-gallon pot and coil of copper tubing or worm, which, when connected by gooseneck, would produce a completed still. Rossman v. U. S. (C. C. A. Ohio, 1922) 280 F. 950.

An indictment charging that defendant unlawfully possessed a still, designed and intended for use in the manufacture of intoxicating liquor, in violation of this section was held fatally defective, as it was uncertain whether the unlawful intent or design alleged was that of maker, designer, or possessor. U. S. v. Horton (D. C. Ala. 1922) 283 F. 731.

An information alleging that the accused had in his possession a 500-gallon and a 35-gallon copper still, two worms, and 32 condensers, designed for the manufacture of intoxicating liquor intended for use in violation of the National Prohibition Act (incorporated in this title) has been held sufficiently to describe the apparatus and possession thereof with intent to violate the Act. Adamson v. U. S. (C. C. A. Ga. 1924) 296 F. 110.

Count of information charging possession of property designed for manufacturing liquor in violation of National Prohibition Act (incorporated in this title) held not objectionable, as being indefinite as to time and place, and as to party charged. Walker v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 309.

Petitioner was held not entitled to discharge from custody because of defects of indictment not affecting jurisdiction. Biddle v. Hays (C. C. A. Kan. 1925) 8 F. (2d) 937.

Information charging possession held not insufficient for want of averment that possession was with intent to use unlawfully. Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260.

Evidence of a statement by defendant that he was going to load a quantity of liquor then in his private dwelling on a truck standing by the cellar window was held to warrant filing of an information charging unlawful possession. U. S. v. Bonner (D. C. Pa. 1923) 285 F. 393.

13. Evidence.—Burden of proof to show lawful possession. See notes to section 50 of this title.

Where intoxicating liquor was stored in the basement of a hotel, though the hotel keeper disclaimed ownership, and it was claimed by one having a permit to use it for certain stated purposes, the location and character of the place raised the pre-

sumption that the liquor was kept in violation of this section. U. S. v. Masters (D. C. Pa. 1920) 267 F. 581.

Evidence held to sustain conviction under National Prohibition Act (incorporated in this title), for unlawful possession of property designed and intended for manufacturing intoxicating liquor. Gracie v. U. S. (C. C. A. R. I. 1926) 15 F.(2d) 644, certiorari denied (1927) 47 S. Ct. 449, 71 L. Ed. —; Palazini v. U. S. (C. C. A. R. I. 1926) 14 F.(2d) 886; Felton v. U. S. (C. C. A. Ky. 1925) 8 F.(2d) 990; Webb v. U. S. (C. C. A. Okl. 1925) 8 F.(2d) 145.

Evidence held insufficient to sustain conviction of illegal possession of distilling apparatus designed and intended for unlawful manufacture of intoxicating liquor. Harlivy v. U. S. (C. C. A. Okl. 1926) 13 F. (2d) 114.

14. Instructions.—Instruction that it was unlawful to possess any article designed for manufacture of alcohol or intoxicating liquor held erroneous, under this section, as omitting element of intent. Filippelli v. U. S. (C. C. A. Cal. 1925) 6 F.(2d) 121.

15. Verdict.—A verdict of acquittal on counts charging unlawful possession of liquor and property designed for manufacturing liquor, and unlawful manufacture, held not to have force of res judicata, precluding conviction on count charging maintenance of nuisance. Gozner v. U. S. (C. C. A. Ohio, 1925) 9 F.(2d) 603.

16. Sentence and punishment.—Conviction on count under this section and count under section 30 of this title. See annotation under latter section.

Separate sentences for possessing whisky and possessing still and mash held not "double punishment" within Const. Amend. 5. Berry v. U. S. (C. C. A. Okl 1927) 18 F.(2d) 276.

One convicted under St. Cal. 1921, p. 79, adopting penal provisions of this act, which provides for no other penalties than fines for possessing, transporting, and possessing still for manufacturing, intoxicating liquor, in violation of this section and sections 12 and 46 of this title, may be imprisoned, under Penal Code Cal. § 1446, in proportion of one day's imprisonment for each dollar of fine until paid. Ex parte Garrison (D. C. Cal. 1924) 297 F. 509.

Conviction for illegal manufacture precludes sentence for possession of both liquor and still under separate counts. Dexter v. U. S. (C. C. A. Fla. 1926) 12 F.(2d) 777.

17. Review.—Conviction under this section affirmed. Placenza v. U. S. (C. C. A. Cal. 1923) 293 F. 104.

Convictions of possessing intoxicating liquor in violation of this section, affirmed. Pincolini v. U. S. (C. C. A. Nev. 1924) 295 F. 468.

Conviction of possessing property designed for manufacture of liquor, intended to be used in violation of this section, affirmed. Savage v. U. S. (C. C. A. W. Va. 1924) 295 F. 686.

Conviction of possessing intoxicating liquor intended for use in violating law, and possessing property designed for manufacture thereof, in violation of this section, reversed for error in instruction. Carney v. U. S. (C. C. A. Mont. 1924) 295 F. 606.

Conviction of conspiracy to violate this section affirmed. Norton v. U. S. (C. C. A. Tex. 1924) 295 F. 136.

18. Consequences of conviction.—Alien convicted of possession of still in violation of this act during period of probation, held not eligible to citizenship. In re Phillips (D. C. Tex. 1924) 3 F.(2d) 79.

III. SEARCHES AND SEIZURES

IN GENERAL

31. Search in general.—That statute places the burden of proving that possession of liquor was lawful on the possessor does not deprive him of the right to protection against unlawful search and seizure. U. S. v. Dossi (D. C. N. Y. 1926) 12 F.(2d) 956.

This section and section 53 of Title 18, Criminal Code and Criminal Procedure, are a limitation on right of search. Temperani v. U. S. (C. C. A. Cal. 1924) 299 F. 365.

Provision of National Prohibition Act (incorporated in this title) as to search of private dwelling controls local act in Alaska. U. S. v. Berkeness (C. C. A. Alaska, 1926) 16 F.(2d) 115, certiorari granted (1927) 47 S. Ct. 574, 71 L. Ed. —.

Constitutional rights against search and seizure, including search of premises not dwelling, is protected by National Prohibition Act (incorporated in this title). U. S. ex rel. Frank v. Mathues (D. C. Pa. 1927) 17 F.(2d) 274.

"If the seizure is merely based upon a suspicion, and the facts are not sufficient to justify an arrest, the subsequent discovery by an examination of the evidence, secured by the seizure, that the suspicion was in fact well-founded, is not sufficient to make what was unlawful at its commencement, a lawful search." Garske v. U. S. (C. C. A. Minn. 1924) 1 F.(2d) 620.

Where police officers entered a building facing on the street, passed through a hallway, and came out on a yard behind, and there through windows of a second building saw men in a room where still was in active operation, entry of the officers into the room was legal. De Gregorio v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 295.

32. Seizure in general.—Druggist, furnishing bottles in which to carry away liquor unlawfully seized, held not to have

waived his constitutional rights. In re Lobosco (D. C. Pa. 1926) 11 F.(2d) 892.

Prohibition agents, who, after entering accused's premises without trespass, clearly noticed fumes from distillation of mash, held justified in seizing instrumentalities with which crime was being committed. Weeke v. U. S. (C. C. A. Mo. 1926) 14 F.(2d) 398, error dismissed and certiorari denied (1927) 47 S. Ct. 456, 71 L. Ed. —.

Illegal seizure and detention of spirits by government officers cannot be defended or justified by the illegality of the owner's possession. Keefe v. Clark (D. C. Mass. 1923) 287 F. 372.

33. Nature of proceeding.—Search and seizure is preliminary proceeding in rem looking to destruction of liquors seized, and should be distinguished from complaint and warrant charging offense, and from proceeding before commissioner to determine probable cause. U. S. v. Ephraim (D. C. R. I. 1925) 8 F.(2d) 512.

34. Property subject to search or seizure in general.—Permit under National Prohibition Act (incorporated in this title) authorizing manufacture and possession of wine for nonbeverage purposes, does not afford protection to one possessing such liquors with intent to use them in violation of Prohibition Act (incorporated in this title) and liquor so possessed is subject to search and seizure under this section. Dumbra v. U. S. (N. Y. 1925) 45 S. Ct. 546, 268 U. S. 435, 69 L. Ed. 1032.

Likewise, possession of a valid permit to possess and sell liquor does not exempt the holder from search and seizure of liquor in his possession, where there is ample evidence that the permit is used as a cloak for unlawful sales, on forged and fictitious permits to purchase, and that he has not made the returns of sales required by law. Lipschutz v. Quigley (D. C. Pa. 1923) 287 F. 395.

Intoxicating liquors, neither reported nor contained in the owner's private dwelling, but in a place of business open to the public, were prima facie subject to seizure under this section, and section 50 of this title. O'Connor v. U. S. (D. C. N. J. 1922) 281 F. 396.

Beer containing more than one-half of 1 per cent. of alcohol was contraband, and no property right existed in it, and it was subject to seizure by prohibition officers under this section and section 40 of this title. U. S. v. Westmoreland Brewing Co. (D. C. Pa. 1923) 294 F. 735, affirmed Westmoreland Brewing Co. v. U. S. (1923) 294 F. 740, certiorari denied (1924) 44 S. Ct. 231, 263 U. S. 722, 68 L. Ed. 525.

35. —— Dwelling houses.—Under National Prohibition Act (incorporated in this title) search of private residence is authorized only on the ground that it is being used for unlawful sale of intoxicating liquors. U. S. v. Vallos (D. C. Wyo. 1926) 17 F.(2d) 390.

Under this section a private dwelling house is not subject to search merely because liquor is unlawfully manufactured therein for commercial purposes. U. S. v. Palma (D. C. Mass. 1924) 295 F. 149.

The character of a cellar as part of the owner's private dwelling is not lost by illegal use of the cellar by others not permitted or acquiesced in by him. Keefe v. Clark (D. C. Mass. 1923) 287 F. 372.

Rooms in a hotel occupied by the proprietor thereof exclusively as his residence and not used for hotel purposes constitute a private dwelling within the meaning of this section and as such are immune from search. U. S. v. Sievers (D. C. Mass. 1923) 292 F. 394.

Room in garage building in which one of the garage employees slept and cooked his meals was held not a "private dwelling," within this section, forbidding search of "private dwelling," except under certain conditions. Steele v. U. S. (N. Y. 1925) 45 S. Ct. 414, 267 U. S. 498, 69 L. Ed. 757.

Subbasement, used as distillery by lodger renting room and subbasement was held not home, such as would grant him privileges as to search and seizure. Waxman v. U. S. (C. C. A. Cal. 1926) 12 F.(2d) 775, certiorari denied (1926) 47 S. Ct. 108, 71 L. Ed. —.

Cabin, containing still in wooded swamp 230 feet from accused's dwelling, was held not part of home curtilage, protected against search and seizure. Dulek v. U. S. (C. C. A. Mich. 1926) 16 F.(2d) 275.

36. Search and seizure in connection with arrest.—A person lawfully arrested may be searched for instruments, fruits, and evidences of the crime, and if taken in commission of the crime in a building the latter may likewise be searched to the extent that the offender's control and activities likely extended, and such search is reasonable, and not within the prohibition of the Fourth Amendment. Sayers v. U. S. (C. C. A. Wash. 1924) 2 F.(2d) 146.

In a search after arrest, not only may fruits and instruments of crime be seized, but also evidentiary articles, including papers, incidentally discovered. Id.

37. Search or seizure by consent.—If both lessor and lessee had free access to garage on leased premises, and used it in common, and officers entered and searched the garage, and took a trunk and barrel therefrom at the invitation of and with the assent of lessee, in the presence of lessor, who disclaimed being in possession of the garage and having any interest in the trunk and barrel, the contents of the trunk and barrel, used as evidence in the prosecution of the lessor for having unlawful possession of intoxicating liquor, held not to have been obtained

through an unreasonable search and seizure, in violation of Const. Amend. 4. Driskill v. U. S. (C. C. A. Ariz. 1922) 281 F. 146.

A search permitted by a person after declaration by the prohibition officer, with a display of his badge, that they were there to search the premises, was not by such consent as will amount to a waiver of constitutional rights, but, on the contrary, is to be attributed to a peaceful submission to officers of the law. U. S. v. Slusser (D. C. Ohio, 1921) 270 F. 818.

38. Vessels and vehicles.—The Treaty between Great Britain and the United States of May 22, 1924, defines and exclusively determines the status of British vessels lying off the shore of the United States, and visited by boats from shore to obtain contraband liquor, and unless authorized by its terms such vessels are not subject to seizure. The Frances Louise (D. C. Mass. 1924) 1 F.(2d) 1004, appeal dismissed U. S. v. Backman (1926) 46 S. Ct. 209, 270 U. S. 666, 70 L. Ed. 789.

Seizure of a Canadian vessel at sea within the distance from the coast of the United States permitted by the treaty with Great Britain of May 22, 1924, was held not in violation of international law, and justified under the treaty by reasonable cause to believe that she was transferring liquor from her cargo to other vessels, to be carried ashore. U. S. v. Ford (D. C. Cal. 1925) 3 F.(2d) 643.

As regards searches and seizures of intoxicating liquor under Const. Amend. 4, section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, and this section, it is an invasion of the right of a citizen to place across a road a plank with nails standing upright, so as to puncture the tires of an automobile, as to which there is no evidence showing probable cause that it is being used in violation of the law. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

Officers searching for liquor under Const. Amend 4, section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, and this section, should not jeopardize lives by firing at automobiles, in the hope of puncturing tires of a fleeing automobile. Id.

39. Persons entitled to object.—Defendant not making any claims to premises searched or property seized cannot urge unreasonable search on which to base constitutional right. Armstrong v. U. S. (C. C. A. Cal. 1926) 16 F.(2d) 62, certiorari denied (1927) 47 S. Ct. 571, 71 L. Ed. ——.

A defendant cannot avail himself of an objection to the legality of the search of a place with which he claims he had no connection, nor of the seizure of property in which he claims to have had no interest. Goldberg v. U. S. (C. C. A. Ga. 1924) 297 F. 98.

40. Presumptions and burden of proof.—"What is an 'unreasonable search' or seizure is always a judicial question [United States v. Bateman (D. C. Cal. 1922) 278 F. 231, 232], and is determinable from a consideration of the circumstances involved. Officers of the government act under legal authority, in pursuance of oath and official station, and it will be presumed, in the absence of countervailing proof, that they have performed their duty—that is, that they have not been guilty, in a given instance, of making an unreasonable search or affecting an unreasonable seizure. The burden of showing the contrary, then, is upon him who contends to the contrary." U. S. v. Vatune (D. C. Cal. 1923) 292 F. 497.

41. Custody and storage of property.—Beer, seized by inspecting prohibition agents as being in violation of permit for manufacture of cereal beverages, in containers and in racking room, before reduction of alcoholic content to legal limit may be retained by prohibition authorities pending action on citation. Seitz Brewing Co. v. Blair (D. C. Pa. 1926) 13 F.(2d) 946.

Bonded warehouse keeper, renting storeroom to government officers for storage of liquor seized, held not liable to owner as bailee for loss of liquor. Armstrong v. Sisti (1926) 242 N. Y. 440, 152 N. E. 254, reversing (1925) 210 N. Y. S. 822, 214 App. Div. 810.

Bonded warehouse keeper, renting storeroom to government officers for storage of liquor, held to have no greater duty to owner than to officers. Id.

WITHOUT WARRANT

51. In general.—Under Const. Amend. 4, section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, and this section, the fact of finding liquor by reason of the search of either suitcases or automobiles cannot be a justification for a search that was made without a lawful warrant, or without probable cause for believing that a crime was being committed in the presence of the officer. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

R. S. § 3177 (section 92 of Title 26, Internal Revenue) extends authority of deputy collector of internal revenue to search without search warrant to places where intoxicating liquors are "kept" as that word is used in revenue laws, distinguished from its use in National Prohibition Act (incorporated in this title). Cooper v. U. S. (C. C. A. N. J. 1924) 299 F. 483.

The entry without permission, express or implied, into a private garage, without warrant, on a mission of search and seizure, by prohibition agents of the

United States, is unlawful. U. S. v. Slusser (D. C. Ohio, 1921) 270 F. 818, wherein the court said: "The right of the people to be secure in their houses and effects against unreasonable searches and seizures is not limited to dwelling houses but extends to a garage used personally and for hire."

"It will be conceded, of course, that an officer has no right to assume that an apparently innocent and unoffending person is actually engaged in a violation of the law. Therefore such officer would not be acting reasonably—would be acting 'unreasonably'—were he to subject apparently innocent and unoffending persons to search or their effects to seizure. Having no reason to believe in their guilt, it would be unreasonable to act as if they were in fact guilty. Therefore, to justify an arrest, an invasion of the rights of the person, or a search or seizure, an invasion of the rights of the property, of an individual, sufficient to avoid the protective provisions of the Fourth Amendment, the officer must be in possession of such knowledge, from the employment of his own senses, or from information actually imparted to him by another, as to cause him honestly and in good faith, acting with reasonable discretion, to entertain the belief or suspicion that the law is being violated. Ballard v. State (1885) 43 Ohio St. 16, 1 N. E. 76, 79; Ex parte Morrill (C. C. Or. 1888) 35 F. 261, 267; United States v. Snyder (D. C. W. Va. 1922) 278 F. 650; Wharton's Crim. Proc. (10th Ed.) § 34. And if the suspect be committing a concealed crime, one not open to view, the greater the obvious necessity, of course, of relying upon information. Ballard v. State, supra.

"In these days of widespread violation of the law, due to large temptation, big profits, and unrestrained appetites, together with the facile employment of the automobile in aid of successful consummation thereof, an officer ought not to be censured nor society penalized by a meticulous refusal to support a prosecution, if the officer, even in the absence of a warrant, and even with respect to a mere misdemeanor, acting upon the appearances, determines that the law may be maintained only by the 'immediate apprehension' (Wharton's Crim. Proc. [10th Ed.] section 35) of the offender, providing always, of course, that the officer acts in good faith and upon reasonable grounds of suspicion (Houck v. State [1922] 106 Ohio St. 195, 140 N. E. 112). And it ought to be obvious that the claim of good faith of the officer will always be materially supported, though of course it could not be created, by the subsequent discovery of evidence tending to support the charge that the law was then and there being violated. The event contributes justification for the act. * * * In considering the question of such good faith, it ought also to be specially kept in mind that all officers are presumed to be engaged only in the proper performance of their duty, and that the exception to the rule, so to speak, should be specially pointed out. All reasonable intendments should be indulged in, in support of the propriety of official action, and all proper encouragement given to those actually engaged, not infrequently at the peril of their lives, in the attempted protection of society from those who would despoil or destroy it.

"In other words, in the practical and intelligent effort to enforce the law in the face of the violations thereof, made possible by modern conditions, modern instrumentalities, and modern devices, we will dismally fail in our duty to protect society, if we fail to make adequate and effective use of all the machinery available under the law. This does not mean that individual rights, guaranteed under the Constitution or otherwise, are to be disregarded; but it does mean, to me, at least, that positive encouragement, arising out of a lax regard for the rights of organized society, is not to be accorded to those who would subvert the law and ultimately effect the destruction of government." U. S. v. Vatune (D. C. Cal. 1923) 292 F. 497.

Where building searched was not a home or residence, and odors therefrom were that of beer, and things seen in building were such as were used in making beer, it was sufficient to justify reasonable belief that defendant was offending against the National Prohibition Act (incorporated in this title) and was sufficient to warrant seizure of beer and instrumentalities used in its making without warrant. Vaught v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 370.

Search of automobile without warrant held warranted. Milam v. U. S. (C. C. A. Va. 1924) 296 F. 629, certiorari denied (1924) 44 S. Ct. 460, 265 U. S. 586, 68 L. Ed. 1192.

Search and seizure of liquor was not lawful where residence was entered only with warrant for arrest and arrest was not made. U. S. v. Vallos (D. C. Wyo. 1926) 17 F.(2d) 390.

Where there had been numerous convictions of defendant for violation of the National Prohibition Act (incorporated in this title) by sale of liquor in his store, entry of prohibition agents, without a search warrant, into his yard, where they found bottles and a keg, was held not an unreasonable search, which rendered such articles inadmissible in evidence. Jones v. U. S. (C. C. A. S. C. 1924) 296 F. 632.

52. Private dwellings.—Search of defendant's home without a warrant is unlawful, unless in the officer's presence defendant is engaged in committing a crime,

and such crime warrants search only with relation to the particular offense. U. S. v. Boyd (D. C. Wash. 1924) 1 F.(2d) 1019.

The fact that prohibition agents had evidence of the sale of intoxicating liquors in a private dwelling did not legalize their search of the dwelling without first obtaining a search warrant. Connelly v. U. S. (D. C. N. Y. 1921) 275 F. 509.

Federal narcotic officer, on detecting odor of burning opium coming from defendant's home, was authorized to search premises without a warrant for violation of Harrison Anti-Narcotic Act (chapter 11 of Title 26, Internal Revenue) only, and not for violation of National Prohibition Act (incorporated in this title) in view of this section, which provides search warrant for liquor shall not issue for private dwelling unless liquor is unlawfully sold therein. U. S. v. Boyd (D. C. Wash. 1924) 1 F.(2d) 1019.

Search of dwelling room in rear of fruit store without warrant, on information furnished by government witness, who purchased liquor therein, and seizing of whisky therein, were unreasonable, under Const. Amend. 4. Peru v. U. S. (C. C. A. Neb. 1925) 4 F.(2d) 881.

Where prohibition agents detected fumes of cooking mash emanating from basement, search of dwelling under invalid warrant was not justified, as incidental to lawful arrest for offense committed in their presence. Staker v. U. S. (C. C. A. Ky. 1925) 5 F.(2d) 312.

Search of dwelling house without warrant held in violation of Constitution and statute, and evidence obtained inadmissible. Lindsly v. U. S. (C. C. A. La. 1926) 12 F.(2d) 771.

Search and seizure of liquor from defendant's private dwelling, without a warrant, by police, under direction of federal prohibition agent, held unlawful. U. S. v. Dossi (D. C. N. Y. 1926) 12 F.(2d) 956.

Search of combined residence and business building and basement thereof, wherein liquor was found, held reasonable, irrespective of validity of search warrant, in view of violation of law carried on in presence and hearing of officers. Dowling v. Collins (C. C. A. Ky. 1926) 10 F.(2d) 62, certiorari denied (1926) 46 S. Ct. 356, 270 U. S. 660, 70 L. Ed. 786.

It has been held that where a police officer sees a still in full operation in a private dwelling, he may seize it without a search warrant, and where it appears from the evidence of the owner that the still was being used for manufacturing intoxicating liquor for sale, it will be ordered to be destroyed. In re Mobile (D. C. La. 1922) 278 F. 949. Regarding the validity of such a seizure the court said:

"The petitioner voluntarily stated that he was a longshoreman, and had been hurt, and that he was out of work, and was making a little 'booze,' which he sold. The officer arrested petitioner and took charge of the still, mash, and liquor, and to this the petitioner made no objection whatever. The still and other property were taken to the police station. Prohibition officers of the United States were then notified by the police, and the property was turned over to them. Under the provisions of the National Prohibition Act [incorporated in this title] it is unlawful to manufacture or sell intoxicating liquor for beverage purposes. It is also made unlawful to possess any liquor or property designed for the manufacture of liquor intended for use in violating the provisions of the act. For the purpose of enforcing the law a search warrant may issue, on probable cause shown, to search any premises whatever. It is further provided, however, that no search warrant may issue to search any private dwelling occupied as such, unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding house. It is elemental that probable cause must be shown by facts within the knowledge of the affiant, who must swear to them specifically, and no warrant should issue on allegations of mere belief. Considering the provisions of the statute, it seems to me that under a proper construction of the act, applying thereto the rules of interpretation, the words 'some business purpose' would include the manufacture of intoxicating liquor for sale. The words 'store, shop, saloon, restaurant, hotel or boarding house' are illustrative rather than exclusive. Therefore, notwithstanding the building in this case was a private residence, occupied as such, a search warrant could properly have issued on the testimony of Kuepferle. Warrants, sometimes designated search warrants, may be issued after property has been taken into possession by peace officers, for the purpose of seizing and holding the property; but no search warrant was required in this case. The petitioner was apprehended in the active participation of an offense denounced by the law. The violation of the law was disclosed voluntarily by him. He was present and acquiesced in the seizure and removal of his property. Under these circumstances, there was no violation of his constitutional rights." In another case, the court said: "The internal revenue laws prohibit stills in dwelling houses, and those who unlawfully install them therein cannot take advantage of their own crimes or wrongs to defeat the operation of the laws of inspection and supervision, by any plea of immunity or sanctity attaching to dwelling houses. Said laws authorize federal officers to enter any distillery at any time, to inspect, to gauge, to assess and collect taxes, and to seize for forfeiture all liquor upon which taxes are due, evad-

ed and unpaid, and the instrumentalities of its production. Searches and seizures to that end are not unreasonable, require no special or paper warrant, are not obnoxious to the Fourth or Fifth Amendment, and were authorized at the inception of and have endured throughout this government. See Boyd v. U. S. (N. Y. 1886) 116 U. S. 623 et seq., 6 S. Ct. 524, 29 L. Ed. 746. All these internal revenue laws are by the Prohibition Act [incorporated in this title] extended to illicit liquors. The provisions of said act forbidding search of private dwellings without a search warrant, and prohibiting search warrant unless the dwelling is being used for unlawful sale of intoxicating liquor or unless in part used for some business purpose, have no application to the cases at bar. In so far as the instant premises were dwelling houses, they were used for the business purpose of distillation of spirits by distillers, and had been converted to distilleries and subjected to the aforesaid revenue laws. To contend otherwise is to impute to Congress intent to encourage the infant industry of illicit family distilleries, to sanction the most pernicious evil of the day, and to undermine obedience to law, respect for government, and national morality. No such imputation is justified by any language of the Prohibition Act [incorporated in this title].

"Moreover, aside from the internal revenue laws, there was lawful authority to enter and seize. The officers were cognizant of crimes, felonies being committed in the premises. Always was authority to break, enter, search and seize in such circumstances; and neither before nor after the Fourth and Fifth Amendments was it unreasonable. Otherwise, the householder might set up and operate his still as a parlor ornament in the front window and with complete immunity—an absurdity for which no reasonable basis is found in the Prohibition Act [incorporated in this title]." U. S. v. Apple (D. C. Mont. 1924) 1 F.(2d) 493.

53. Places open to public or to officers.—A search warrant is not necessary to authorize prohibition agents to enter a soft drink place open to the public. McWalters v. U. S. (C. C. A. Cal. 1925) 6 F.(2d) 224.

Where government officers entered the defendants' soft drink parlor without warrant or process, jumped over the bar, and made a search, seizing a small quantity of liquor, which they preserved for evidence, under the circumstances disclosed, it was held that a search warrant was not necessary. Kathriner v. U. S. (C. C. A. Cal. 1921) 276 F. 808.

Agents of the federal Prohibition Commissioner, having lawfully entered a place of business open to the public, and being made conscious through sight and smell of the possession of liquor, and noting conditions evidencing that the liquors were kept in violation of the National Prohibition Act (incorporated in this title), had the legal right to search and seize them without first securing a search warrant. O'Connor v. U. S. (D. C. N. J. 1922) 281 F. 396.

Where a brewery was operating under an order of court, made in an abatement suit, permitting such operation on condition that the product should conform to the law, the taking of samples of the product by revenue officers, though without a search warrant, was not an unreasonable search and seizure. Westmoreland Brewing Co. v. U. S. (C. C. A. Pa. 1923) 294 F. 740, and certiorari denied (1924) 44 S. Ct. 231, 263 U. S. 722, 68 L. Ed. 525.

Where a state officer entered defendant's place of business, as he was authorized to do by the state law, and there found and seized intoxicating liquor, the fact that he was accompanied by federal agents did not render a search warrant necessary. Ludwig v. U. S. (C. C. A. Wis. 1924) 3 F.(2d) 231.

No search warrant was necessary to entitle prohibition agents to enter a place conducted as a saloon, and where they there observed obvious violations of the law, they were justified in searching for and seizing evidence of the same. Id.

54. Crime committed in officer's presence.—Officer, to make search or seizure without warrant in store, dwelling, or like structure, must have personal knowledge through one or more of five senses that persons suspected are committing misdemeanor in his presence. Brock v. U. S. (C. C. A. Mo. 1926) 12 F.(2d) 370; Johnson v. U. S. (C. C. A. Mo. 1926) 12 F.(2d) 374.

Ruling that prohibition officer entering soft drink establishment without search warrant had reasonable and probable cause to believe that crime was being committed in his presence, and that his testimony was competent, held not abuse of discretion. Winkler v. U. S. (C. C. A. Wash. 1924) 297 F. 202.

55. Knowledge or information as to commission of offense.—Search without a warrant of an automobile, and seizure therein of liquor subject to seizure and destruction under the Prohibition Act (incorporated in this title) do not violate the Fourth Amendment, if made upon probable cause, i. e., upon a belief, reasonably arising out of circumstances known to the officer, that the vehicle contains such contraband liquor. Carroll v. U. S. (Mich. 1925) 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 132, 39 A. L. R. 790, wherein the court said: "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circum-

stances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

Officers entering a place of business may seize intoxicating liquor in plain sight, regardless of whether they have a warrant to search the premises. Vachina v. U. S. (C. C. A. Nev. 1922) 283 F. 35; Bachenberg v. U. S. (C. C. A. Nev. 1922) 283 F. 37.

An officer may not on seeing the neck of a bottle protruding from the overcoat of a person search him without a warrant. Snyder v. U. S. (C. C. A. W. Va. 1922) 285 F. 1, reversing U. S. v. Snyder (D. C. W. Va. 1922) 278 F. 650, wherein the court said:

"The arresting officer admitted at the trial that he did not know the nature of the contents of the bottle until after he had forcibly taken the same from defendant's pocket. The lower court denied the petition, and in the trial that was subsequently had before a jury the whisky was admitted in evidence, and the question of the legality of the manner in which it was secured foreclosed by a ruling of the court that that question had already been passed upon and was no longer open.

"What we are therefore called on to determine is whether evidence of a misdemeanor obtained under the circumstances hereinabove enumerated is, where seasonable motion for its suppression has been made, admissible at the trial.

"That an officer may not make an arrest for a misdemeanor not committed in his presence, without a warrant, has been so frequently decided as not to require citation of authority. It is equally fundamental that a citizen may not be arrested on suspicion of having committed a misdemeanor and have his person searched by force, without a warrant of arrest. If, therefore, the arresting officer in this case had no other justification for the arrest than the mere suspicion that a bottle, only the neck of which he could see protruding from the pocket of defendant's coat, contained intoxicating liquor, then it would seem to follow without much question that the arrest and search, without first having secured a warrant, were illegal. And that his only justification was his suspicion is admitted by the evidence of the arresting officer himself. If the bottle had been empty or if it had contained any one of a dozen innoxious liquids, the act of the officer would, admittedly, have been an unlawful invasion of the personal liberty of the defendant. That it happened in this instance to contain whisky, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful."

For an officer, when sale was made to him, to seize the liquor and glasses with which the crime was committed, required no search warrant or other process, and motion to suppress evidence thereof was properly denied. Johnstone v. U. S. (C. C. A. Wash. 1924) 1 F.(2d) 928.

Where revenue officers, who seized warm moonshine in accused's truck, had their suspicions aroused by improbable story as to where he obtained it, and by his attempt to prove identity by gas receipt, giving name which officers knew was not his own, and on approaching premises described in receipt officers saw windows all steamed up on inside, it was held, that they were justified in entering premises without search warrant. Wurm v. U. S. (C. C. A. Wis. 1924) 3 F.(2d) 143.

Where officers, with information as to defendants' liquor business, watched garage for several hours, and after seeing heavily loaded automobile enter and doors lock behind it, knocked, were admitted, and seized liquor in car, seizure, though under insufficient warrant, was not unreasonable, nor was garage, which was located under dwelling house, though entirely unconnected with it, a "house," within meaning of constitutional amendment. Earl v. U. S. (C. C. A. Wash. 1925) 4 F.(2d) 532.

Officers observing operation of still on accused's premises were held entitled to go thereon without search warrant. Walker v. U. S. (C. C. A. Cal. 1925) 7 F. (2d) 309.

Search without warrant of vessel, stated by master to be loaded with liquor, was held not illegal. Hilt v. U. S. (C. C. A. Fla. 1926) 12 F.(2d) 504.

Seizure of articles found on search of premises without warrant, after seeing barrels of mash, was held not illegal. Dexter v. U. S. (C. C. A. Fla. 1926) 12 F. (2d) 777.

Under this section, except where an officer is already lawfully on premises, and not there as a trespasser, information there obtained does not justify his entrance and search and seizure without a valid search warrant. U. S. ex rel. Frank v. Mathues (D. C. Pa. 1927) 17 F.(2d) 274.

Search and seizure of whisky in drug store having government permit, without evidence other than having sent woman to make purchase, has been held unreasonable and violative of Const. Amend. 4. Brock v. U. S. (C. C. A. Mo. 1926) 12 F. (2d) 570.

Arrest of defendant on mere suspicion that package which he was carrying and had taken from car contained bottles of liquor, and fact that officer had been informed that defendant was bootlegger and given license number of car which he drove was held invalid, as not on rea-

sonable cause and hence property was wrongfully seized without a warrant and was not admissible in evidence. Brown v. U. S. (C. C. A. Or. 1925) 4 F.(2d) 246.

56. Odors as authorizing search.—In U. S. v. Borkowski (D. C. Ohio, 1920) 268 F. 408, it appeared that a warrant had been issued for the search of a nearby house. While engaged in the search, the officers smelled raisins in the process of cooking somewhere. They saw a light in the cellar of a house, perhaps two or three doors away. Persons could be seen there moving around. The officers went to such house and, entering the cellar, found a still in operation. They discovered the defendants in the commission of an act of a criminal character, a felony, and, having declared their purpose to search the premises, proceeded to do so. The evidence, although somewhat controverted, was that there was no objection made by either of the defendants to the search, and that one of them assented to its making. The fact was admitted that raisins were cooking on a stove in that cellar, that a still was in fact in operation, that raisin whisky and mash were found, and that the articles used in making the whisky and in the process of distillation were seized. Defendant admitted then and at his trial that he "was making a little whisky for Easter." The court said: "If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

Federal agents, who, having entered on premises where there was an unoccupied house, smelled the fumes from a still, were held authorized without a warrant to search, and, having found the still in illegal operation in a stable, to arrest those operating it. McBride v. U. S. (C. C. A. Ala. 1922) 284 F. 416, certiorari denied (1923) 43 S. Ct. 359, 261 U. S. 614, 67 L. Ed. 827.

Where prohibition agents detected the odor of mash when 300 yards distant from a barn on unoccupied premises, their search of the barn without a warrant was not unreasonable or illegal, and not in violation of the constitutional rights of defendants there found operating a still, but who did not reside on the premises. Tritico v. U. S. (C. C. A. Tex. 1925) 4 F. (2d) 664.

Search without warrant of premises and garage, on detecting odor of mash, held reasonable, and evidence procured admissible. Schulte v. U. S. (C. C. A. La. 1926) 11 F.(2d) 105.

Premises of the distiller of alcoholic liquor are always open to federal inspection and supervision, and agents having authority as internal revenue officers, directed by the odor of fermenting mash to a building, in which is a still, have authority to enter without a warrant, though the building may be occupied as a dwelling, and contraband property found and seized therein is admissible in evidence. U. S. v. Lorens (D. C. Mont. 1927) 17 F.(2d) 829.

57. Consent, disclaimer, or failure to object.—A search of premises by a sheriff and prohibition agents without a warrant, but by consent of the owner, freely given on their request, is not an "unreasonable search," within the Fourth Amendment to the Constitution. U. S. v. Williams (D. C. Mont. 1924) 295 F. 219, wherein it was said:

"The Fourth Amendment forbids only 'unreasonable searches.' This search without warrant, but with Williams' consent, was not unreasonable. The case is not like Amos v. U. S. (Cal. 1921) 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654. Here, unlike there, is no coercion. That three officers, without menace or threats, expressed desire to search, is not duress or coercion, express or implied. Nothing indicated the officers would search without consent and with violence, and the presumption is they would not.

"This request made and granted, and search had, no more infringe the Fourth Amendment than do a jailor's questions, put to and answered by an accused in jail, infringe the Fifth. See Bram v. U. S. (Mass. 1897) 168 U. S. 558, 18 S. Ct. 183, 42 L. Ed. 568; U. S. v. Lydecker (D. C. N. Y. 1921) 275 F. 976. Hence, the consent of Williams, no 'modest and retiring violet,' nor 'startled and timid deer,' but an unlawful manufacturer of illicit liquors and a full-grown man, was free and voluntary. The Fourth and Fifth Amendments have become favorites of violators of the National Prohibition Act [incorporated in this title] but this warrants no strained construction."

The search of a private dwelling and the seizure of intoxicating liquor found therein, without a warrant, is unlawful and not excused by a pretended consent obtained by a show of force and firearms. U. S. v. Marquette (D. C. Cal. 1920) 271 F. 120, wherein the court said:

"The liquor was in a private home where liquor might lawfully be, and could not be taken therefrom without a warrant, except upon consent of the occupants of the home, voluntarily given. A

consent accorded to a show of arms, even though no open objection be made, will not be regarded as voluntary. The outlawing of liquor by the Eighteenth Amendment did not abrogate either the Fourth or Fifth Amendment to the Constitution, and the zeal of the enforcement officers in pursuing this recent outlaw cannot be permitted to carry them without warrant across the threshold of the home.

" 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.' Such is the language of the Fourth Amendment. The protection thus afforded can only be insured by the courts. Every case arising must, of course, be determined upon the facts of that particular case; and where, as here, the record shows an invitation to enter, but also shows the presence of shotguns and pistols, I cannot disassociate the one from the other. As there was no warrant either to search the premises or seize the liquor, and as the only justification pleaded is that of 'invitation to enter, and consent to the seizure,' under the circumstances recited, I am of the opinion that the motion for an order for the return of the property should be granted upon the pleadings."

Where a sheriff and his deputy, without a warrant of arrest or search warrant, entered defendant's house through an open door, and seized whisky which was on a table by which defendant was standing, the fact that defendant did not object, or that he then said they might look around, which they did, finding more in another building, was held not to make the search or seizure lawful. Dukes v. U. S. (C. C. A. S. C. 1921) 275 F. 142.

That accused, when arrested, gave an erroneous address, and later, while going with officers, who had a warrant to search the premises, at the address given, told them he would show them where he lived, took them to his home, and told his wife to show the officers through the house, and show them where the whisky was, showed consent to a search of his house, so that it was not unlawful, even though the mistake in the search warrant, induced by his false statement, prevented it from authorizing the search of his true residence and liquor seized was admissible in evidence. Windsor v. U. S. (C. C. A. Ohio, 1923) 286 F. 51, certiorari denied (1923) 43 S. Ct. 523, 262 U. S. 748, 67 L. Ed. 1212.

Search of premises without a warrant, but with the consent of the person left in charge by the owner on his arrest, has been held lawful. Raine v. U. S. (C. C. A. Nev. 1924) 299 F. 407, certiorari denied (1924) 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

Court held justified in finding person accused of maintaining still consented to search, precluding claim of invasion of constitutional rights. Waxman v. U. S. (C. C. A. Cal. 1926) 12 F.(2d) 775, certiorari denied (1926) 47 S. Ct. 108, 71 L. Ed. —.

In view of consent by accused to search of his dwelling, no search warrant was necessary, and hence this section and section 53 of Title 18, Criminal Code and Criminal Procedure, providing no search warrant shall issue to search dwelling unless used for unlawful sale, cannot be invoked to invalidate evidence of officers as to what they found during search. French v. Commonwealth (1925) 277 S. W. 265, 211 Ky. 288.

Search without a warrant of a building of which defendant, charged with the unlawful possession of liquor, disclaimed possession, was not a violation of his constitutional rights. Jones v. U. S. (C. C. A. S. C. 1924) 293 F. 632.

Officer seizing property without warrant after disclaimer by occupant of dwelling in basement of which liquor was found cannot be said to have violated constitutional right of occupant. U. S. v. 185 Cases Scotch Whisky (D. C. R. I. 1926) 15 F.(2d) 563.

Under evidence showing occupants disclaimed knowledge of liquor found in garage in basement of dwelling, seizure by officer without formal application for search warrant was held not unreasonable. Id.

Disclaimer by occupants of knowledge of presence of liquor found on premises was held sufficient to justify removal by officer without search warrant. Id.

One who disclaims ownership of liquors seized without search warrant thereby waives his right to complain of unlawful search and seizure. U. S. v. Lorenz (D. C. Mont. 1927) 17 F.(2d) 829.

58. Search and seizure in connection with arrest.—Where agents properly arrested a person they had the right to search his person without a warrant as an incident of the arrest. U. S. v. Kraus (D. C. N. Y. 1921) 270 F. 578.

In the event of a citizen being arrested for being drunk or disorderly, or for some other crime, if after his arrest he is searched without warrant and liquor is found on him, the search and seizure is lawful, and the liquor can be retained. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

The arrest of a person, on his making an illegal sale of liquor to a prohibition agent in a store, and a search of the premises and seizure of liquor there found, without a warrant, was held legal. Cabitt v. Potter (D. C. Mass. 1923) 293 F. 54.

Where prohibition officers saw some-

thing in an open car, covered up, and, turning their car around, started to follow, when the other car so increased its speed that it was wrecked at a turn, the officers were warranted in arresting the persons driving the car, and in making a search of the car, wherein they found intoxicating liquors; they sincerely believing that the car was engaged in transporting whisky, and the result showing that their belief was sound. U. S. v. Stafford (D. C. Ky. 1923) 296 F. 702. For same case at later stage, see Stafford v. U. S. (C. C. A. 1924) 300 F. 537. The court said: "In every case where there is some evidence tending to show that an offense is being committed, and it is such as to cause the officer sincerely to believe that such is the case, and it turns out that his belief is correct, the arrest and subsequent search and seizures are legal. Whilst it may be the fact that, at the time of the arrest and search, he does not know what he subsequently discovers, yet the fact that the belief is found to be correct accredits the belief, and gives weight to the evidence on which the officer acted. He was on the ground, and he was acting under oath. It is not always possible for one to convey to another what he has observed as vividly as it appeared to him. It is on this ground that the opinions of common observers as to matters of fact are often admitted in evidence on a trial thereof. Possibly, by reason of experience, he is more skilled than the trial judge in determining the meaning of things in such cases. One apprehended whilst violating the law, and thereby prevented from continuing such violation, is not entitled to any further consideration. In determining the law as to the right of arrest, cases in which the officer has made a mistake are not pertinent. Those only are pertinent where he has made no mistake. A violator of the law, caught red-handed, is not entitled to shield himself under the law applicable to a nonviolator. The two do not stand on the same footing, and should not be placed there.

"As bearing on the stopping and searching of automobiles on account of violations of the National Prohibition Act [incorporated in the title], it is to be noted that that act makes it the duty of the prohibition agents to seize any and all intoxicating liquors found being transported contrary to law in any vehicle, and the vehicle itself, when they 'shall discover' that they are being so transported, without prescribing any limitations as to the efforts taken to so discover, and further that the act of November 23, 1921 [section 53 of Title 18, Criminal Code and Criminal Procedure], making it an offense for such agents to search any other building or property than a private dwelling without a search warrant, prescribes that, in order for such to be an offense, it is essential that the search be made 'maliciously and without reasonable cause.' Under the latter act it is not sufficient that the search be made without reasonable cause. It is essential, further, that it be made maliciously."

On the arrest of defendant after selling whisky to prohibition agents in a room in a hotel, search of that and adjacent rooms, and the seizure of liquor and papers there found, was held lawful, without a search warrant. Sayers v. U. S. (C. C. A. Wash. 1924) 2 F.(2d) 146.

Seizure of liquor, found by narcotic officer during bona fide search of hotel for narcotics without warrant after arrest of proprietor, was held lawful, and liquor so seized admissible in evidence. U. S. v. Charles (D. C. Cal. 1925) 8 F.(2d) 302.

Officers making arrest held to have probable cause to believe felony was being committed, and evidence admissible, though search warrant void. Billingsley v. U. S. (C. C. A. Okl. 1926) 16 F.(2d) 754.

If the officers of the law should discover any person actually violating the Alaska Prohibition Act (incorporated in this title) by manufacturing liquor, or having it in their possession, then it is their duty to make an immediate arrest, and on such arrest the officers are authorized to take possession of the liquor so being manufactured and used, without a search warrant. U. S. v. Giovanetti (1921) 6 Alaska, 454.

59. Proceedings by libel in rem.—Under this section and section 30 of this title and sections 611 et seq. of Title 18, Criminal Code and Criminal Procedure, which contain a complete code of procedure for the allowance and execution of search warrants, the procedure prescribed must be followed for the seizure of the property used in violation of the Prohibition Act (incorporated in this title), and it cannot be seized under a common-law libel in rem, since the Prohibition Act (incorporated in this title) is in derogation of common-law rights of citizens, and the specific procedure provided for its enforcement must therefore be regarded as exclusive. U. S. v. Franzione (1923) 286 F. 769, 52 App. D. C. 307.

The provisions of sections 40, 44, and 62 of this title, authorizing immediate seizure of vehicles used to transport intoxicating liquors and of the liquor so transported, extending the authority of the court to cases where intoxicating liquors are subject to be destroyed by permitting the court to dispose of them for specific purposes, and regulating the service of summons in certain cases, do not authorize the seizure of property used in violation of the act by common-law libel in rem, instead of by search warrant. Id.

60. Care and custody of property seized.—Expenses of caring for liquors seized by government without search warrant is

on claimants after filing of claim only. Avignone v. U. S. (C. C. A. N. Y. 1926) 12 F.(2d) 509.

UNDER WARRANT

71. In general.—See, also, notes to sections 611 to 633, of Title 18, Criminal Code and Criminal Procedure.

Statutes authorizing search warrants must be strictly construed. Perry v. U. S. (C. C. A. Cal. 1926) 14 F.(2d) 88.

In Alaska there are three provisions of law in force under which a search warrant may issue for intoxicating liquors: First, under section 17, Alaska Prohibition Act (section 278 of Title 48, Territories and Insular Possessions); second, under the provisions of section 23 of the same act (section 284 of Title 48, Territories and Insular Possessions); in both such cases, however, the warrant must issue under the procedure of and limited by the general search warrant act of Alaska (sections 2488–2490, Compiled Laws, Alaska, 1913); and, third, under the provisions of this section, subject to and governed by the provisions of the general search warrant act of June 15, 1917 (chapter 18 of Title 18, Criminal Code and Criminal Procedure). U. S. v. Giovanetti (1921) 6 Alaska, 454.

Under this section, a search warrant for liquors may issue, in manner and form as provided for by section 623 of Title 18, Criminal Code and Criminal Procedure, in aid of the enforcement of this act. Rose v. U. S. (C. C. A. Ohio, 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed. 419.

Where warrant to search premises was issued and executed on October 25th, based on a sale on October 9th, a second warrant on November 5th, based on a sale of October 17th, prior to issuance of first warrant, was unwarranted since, under section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, and the National Prohibition Act (incorporated in this title), object of a search warrant is to search for and seize property used as a means for committing a crime, and when that purpose has been accomplished no further search is authorized for causes existing prior to the time of search. Filippelli v. U. S. (C. C. A. Cal. 1925) 6 F.(2d) 121.

The provisions of the National Prohibition Act (incorporated in this title) concerning the issuance of such search warrants, under the limitations provided, are exclusive; hence, in a case thereunder, a search warrant cannot be issued, under section 1195 of Title 26, Internal Revenue. U. S. v. Musgrave (D. C. Neb. 1923) 293 F. 203.

This section imposes only two limitations on issuance of search warrants; that they shall issue to enter private homes only in exceptional cases and that they shall be issued in accordance with Act June 15, 1917 (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure). United States v. Innelli (D. C. Pa. 1923) 286 F. 731.

Consent to search renders validity of search warrant immaterial. Cantrell v. U. S. (C. C. A. Tex. 1926) 15 F.(2d) 953, certiorari denied (1927) 47 S. Ct. 572, 71 L. Ed. —.

Const. Amend. 4, relating to issuance of search warrants, applies equally to warrants issued under National Prohibition Act (incorporated in this title), and those issued under internal revenue statute (section 1195 of Title 26, Internal Revenue). Wagner v. U. S. (C. C. A. Mo. 1925) 8 F. (2d) 581.

The government's right to hold liquors seized under a search warrant depends on the legality of what was done under the warrant, and disregard of constitutional rights of individuals may not be overlooked because of advantage to the government. Keefe v. Clark (D. C. Mass. 1923) 287 F. 372.

"Under the act of 1917 [section 611 et seq. of Title 18, Criminal Code and Criminal Procedure], a search warrant cannot be issued, except upon probable cause supported by affidavit naming or describing the person and particularly describing the property and place to be searched." U. S. v. Rykowski (D. C. Ohio, 1920) 267 F. 866.

"The words, 'If it is found that such liquor or property was unlawfully held or possessed, or had been so unlawfully used, the liquor and all property designed for the unlawful manufacture of liquor, shall be destroyed unless the court shall otherwise order,' found in section 25, tit. 2, of the Volstead Act [this section] were not inserted to regulate the practice upon the return of a search warrant, but to prescribe the ultimate rights of the parties upon a certain state of facts, namely, unlawful possession, etc., assumed in the statute. In other words, these words set forth the circumstances under which the United States may confiscate the liquor, and not the conditions under which it may be seized and held pending a determination of the rights of the parties after a trial." In re Search of No. 15 East Third St. (D. C. N. Y. 1922) 284 F. 914.

Lapse of nine days between seeing of liquor enter warehouse and search therefor held not too long. U. S. v. Old Dominion Warehouse (C. C. A. N. Y. 1926) 10 F.(2d) 736.

72. Property subject to search or seizure.—This section only refers to the Espionage Act (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure), for the proceedings to be followed respecting the issuance of search warrants, and does not, by such reference, restrict the issuance of such a warrant to cases involving property used in committing a fel-

ony. U. S. v. Metzger (D. C. N. Y. 1920) 270 F. 291.

So under this section, making possession of liquor unlawful, and providing for issuance of warrant for search of such liquor under Act June 15, 1917, tit. 11 (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure), warrant could issue for search for unlawfully possessed liquor, though possession is only a misdemeanor. In re Hollywood Cabaret (C. C. A. N. Y. 1925) 5 F.(2d) 651.

Federal prohibition agent, acting under valid warrant, may enter premises and seize liquors unlawfully possessed and personal property designed for manufacture, provided property is duly described and capable of being moved within reasonable time. U. S. v. 63,250 Gallons of Beer (D. C. Mass. 1926) 13 F.(2d) 242.

It has been held that when books required under section 329 of Title 26, Internal Revenue, are not kept or are kept insufficiently, all documents showing transactions which should be so recorded may be seized on search warrant under the pertinent provisions of the Espionage Act (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure). U. S. v. Kraus (D. C. N. Y. 1921) 270 F. 578.

The fact that one has a permit, under the Prohibition Act (incorporated in this title) to make and sell wines on his premises for non-beverage purposes, and is under bond, and the premises subject to inspection by internal revenue officers during business hours, does not preclude the issuance of a warrant, upon probable cause, to search the place for wines there possessed illegally for beverage purposes. Dumbra v. U. S. (N. Y. 1925) 268 U. S. 435, 45 S. Ct. 546, 69 L. Ed. 1032. The court said: "The permit issued did not authorize the possession of intoxicating liquors for beverage purposes by plaintiffs and it could afford no protection to one who possessed such liquors with intent to use them in violation of the National Prohibition Act [incorporated in this title]. Reid v. United States (C. C. A. Ohio, 1921) 276 F. 253. If possessed with such intent, they were subject to search and seizure under section 25 [this section] of the Act (41 Stat. 315), and, if probable cause were shown, a warrant authorizing such search and seizure might be duly and lawfully issued. Under such circumstanecs search and seizure are not unauthorized or unconstitutional."

Permit under which brewery was operating did not protect it from search under valid search warrant. Daeufer-Lieberman Brewing Co. v. U. S. (C. C. A. Pa. 1925) 8 F.(2d) 1.

73. —— Seizure of real estate.—This section confers no authority on prohibition officers to seize property affixed to real estate under warrant issued pursuant to Espionage Act (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure). U. S. v. 63,250 Gallons of Beer (C. C. A. Mass. 1926) 13 F.(2d) 242.

Search warrant, directing seizure of property affixed to real estate, is invalid, as directing executing officer to make illegal seizure. Id.

Search warrants issued under this section, read in connection with the search warrant provisions of Espionage Act (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure) which it incorporates, relate only to property which is movable, and real estate and things annexed to real estate are not within the purview of the statute. U. S. v. Nine 200-Barrel Tanks (Approximately Full) of Beer (D. C. R. I. 1925) 6 F.(2d) 401.

The premises on which a brewery is operated cannot be seized by virtue of a search warrant. In re Crescent Beverage Co. (D. C. Pa. 1923) 297 F. 1009.

So the seizure of the real estate and entire plant and equipment of a brewing company, under the guise of a warrant of search and seizure, was illegal under this section. Mellet, etc., Brewing Co., Inc., v. U. S. (D. C. Pa. 1923) 296 F. 765. The court said: "The prohibition agent and the United States marshal, or rather whatever law officers of the government have directed and supervised their action in this matter, have entirely misconceived the nature and purpose of a warrant of search and seizure and have disregarded the plain language of the statute and the terms of the warrant. A search warrant is an order in writing in the name of the sovereign, signed by a duly authorized officer of the sovereign and directed to a peace officer, commanding him to search for personal property and bring it before the officer signing the warrant. It cannot be used as a cloak for dispossessing a man of his real estate. Section 25 of title 2 of the National Prohibition Act, [this section] after declaring that it shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violation of the act and that no property rights shall exist in any such liquor or property, provides that search warrants for the enforcement of this provision may be issued as provided in title 11 of the Act of June 15, 1917, generally known as the Espionage Act [sections 611 et seq. of Title 18, Criminal Code and Criminal Procedure]. Sections 3 and 6 of the Espionage Act [sections 613 and 616 of Title 18, Criminal Code and Criminal Procedure] provide that if the judge or commissioner is satisfied of the existence of grounds for issuing a warrant under the terms of that act, he shall issue a warrant to a civil officer of the United States commanding him to forthwith search the person or place named for the property described in the affidavit 'and to bring it

before the judge or commissioner.' The warrant in the instant case directed Tippett, his assistants, deputies, and aids, 'to search the said premises for all and singular the articles and things above described and specified which then and there may be found to be located in and upon the premises above described, and in and upon any part thereof, and to seize and to bring same before me.' Disregarding the language of the act and the terms of the warrant, the seizing officers have brought no property before the commissioner, but, instead, have entered upon and seized the entire plant, premises, and equipment of the defendant company, have placed the property under guard, excluding the defendant from possession, and have made no return to the officer issuing the warrant further than the filing with him of an inventory of all the property found on the defendant's premises, including a considerable number of fixtures, also dealcoholizers which are presumably not used in the manufacture of illegal beer, and a considerable amount of property which is at best related very incidentally and remotely to the manufacture of beer.

"Since the defendant's possession of the beer and other property on these premises was lawful under the terms of its permit, and since the question whether the defendant has failed in good faith to conform to the provisions of the act and of its permit must be determined by a hearing before the commissioner as prescribed by section 9 of title 2 of the National Prohibition Act [section 21 of this title] the warrant of search and seizure in this case must be quashed."

74. —— Search of private dwelling.—Under this section a private dwelling, occupied as such, and commonly known as a home or residence, cannot be searched under a warrant, unless it is being used for the sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, or hotel, and probable cause for issuance of such warrant must be based on evidence of sales. Simmons v. U. S. (C. C. A. Okl. 1927) 18 F.(2d) 85.

Under this section, private dwelling was not subject to search under warrant containing no averment of unlawful use of premises, or use in part for trade purposes. U. S. v. Kordos (D. C. Pa. 1926) 13 F.(2d) 905.

A warrant for the search of a dwelling for intoxicating liquor was defective, where not supported by a charge that the dwelling was being used for the unlawful sale of liquor. Voorhies v. U. S. (C. C. A. La. 1924) 299 F. 275.

A warrant issued by a justice of the peace under the smuggling statute, to search for smuggled goods, cannot be legally used to discover evidence of a violation of this section, by search of a private dwelling in violation of the provisions of National Prohibition Act (incorporated in this title) and section 611 et seq. of Title 18, Criminal Code and Criminal Procedure. U. S. v. Moore (D. C. Me. 1925) 4 F.(2d) 600.

A search warrant to search a private dwelling is invalid, where it appears that the warrant and affidavit on which it was issued originally were intended to authorize the search of premises in another county and were subsequently changed by the prohibition agent as to date, name of owner of premises, and location of the same as to make them apply to the premises in question, that the agent did not reswear to the affidavit after making the changes, and that the affidavit did not charge, as required by this section, that the premises were being used for the unlawful sale of intoxicating liquors. U. S. v. Armstrong (D. C. Fla. 1921) 275 F. 506.

"A federal officer cannot lawfully swear out a search warrant to search a private dwelling, when he has not the evidence of illicit sale without which the act of Congress has expressly declared no private residence may be searched, and, being inhibited from doing this under the federal statute, he cannot evade such statute by swearing out the same before a state official." Singleton v. U. S. (C. C. A. S. C. 1923) 290 F. 130.

Search warrant held properly issued to search a house, as against the contention that the house was a private dwelling occupied as such, in view of evidence of the unlawful sale of liquor. McDonough v. U. S. (C. C. A. Cal. 1924) 299 F. 30, motion for leave to file supplemental petition for rehearing denied (C. C. A. 1924) 1 F.(2d) 147, and certiorari denied (1924) 45 S. Ct. 95, 266 U. S. 613, 69 L. Ed. 468.

This act "provides that no search warrant shall issue to search any private dwelling occupied as such, unless it is being used for the unlawful sale of intoxicating liquor, or is in part used for some business purpose. It should not be difficult to keep within these provisions. If in the attempted enforcement of the prohibition law a search warrant is applied for, the first inquiry of the judge or commissioner should be as to the character of the place to be searched. If it be a private dwelling then the inquiry should be:

"'What evidence have you that this place is being used for the unlawful sale of intoxicating liquor?'

"If the officer has no such evidence, he should not apply for the warrant; or if the judge or commissioner is not satisfied with the evidence offered, he should not issue it. If the officer is acting upon information, he should lay all the facts before the judge or commissioner, with the names of the persons from whom his information is received.

"It is not merely a pro forma matter, but one of utmost importance, that search warrants should be properly issued in the first instance. They should not be lightly applied for, nor lightly issued, as they trespass upon the most important rights of the people. When issued, they should be promptly served and promptly returned." U. S. v. Mitchell (D. C. Cal. 1921) 274 F. 128, wherein the court further said:

"Much confusion seems to exist among the enforcement officers concerning the necessity for search warrants and their use. The confusion arises generally, in my opinion, because they are not willing to be bound by the limitations of the Constitution or the law. In pursuing liquor, recently made an outlaw by the Eighteenth Amendment to the Constitution, they are, in their zeal, inclined to disregard other provisions of the same document equally sacred and far more important to the rights of the people. The language of the Fourth Amendment to the Constitution is as follows: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

"The protection thus afforded to the people can only be insured by the courts. It is far more important that the right to be secure in their persons, houses, and effects be zealously guarded than that a few individuals be convicted of violating the prohibition or any other law. It is one of the most sacred rights that the Constitution guarantees, and officers sworn to defend the Constitution should be the first to recognize and defend it."

A city has power to regulate the possession of intoxicating liquors in a manner not in conflict with the National Prohibition Act (incorporated in this title) or the laws of the state, and may authorize the search of a private dwelling for liquors unlawfully possessed, where not prohibited by the state laws, though this section provides that no search warrant shall issue thereunder to search any private dwelling. U. S. v. Viess (D. C. Wash. 1921) 273 F. 279.

Where officers, acting under search warrant covering dwelling used in part as cigar store, went through cellar window of adjoining dwelling, and in a cellar which extended under the rear of both houses found a large amount of liquor and still parts, and where evidence warranted finding that only means of access to cellar was through adjoining premises, search was lawful as against claim that it was a search of a dwelling not used for sale or manufacture of liquor. United States v. Vonski (D. C. Pa. 1927) 18 F.(2d) 283.

Where federal search warrant did not describe house searched as defendant's residence, and the evidence did not establish fact of residence, but conclusively showed that defendant used house as a club house, it was not necessary that the warrant or its supporting affidavit state that the liquor was possessed for sale, or that house was used for some business purpose, such as a store, saloon, etc. Phillips v. Commonwealth (1924) 266 S. W. 893, 206 Ky. 37.

What Constitutes Private Dwelling

Under this section rooms over a saloon, occupied by the proprietor as a dwelling, may be searched under a search warrant for the building including the rooms, based on an affidavit charging sales of liquor in the saloon below. The court said: "The defendant contends that the defendant's living rooms on the second floor were his private residence, and could not be searched under the search warrant, because there was no statement of a sale therein in the affidavit, and that the search must be limited to the rooms on the lower floor. It is true that a private dwelling, within the definition contained in the statute, cannot be searched, except upon a search warrant, based upon affidavit showing a sale of intoxicating liquor in the private dwelling. But that has no application to the defendant's rooms on the second story in this building. They were not a private dwelling under the statute. Section 25 of title 2 of the National Prohibition Law [this section] says: 'No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house.'

"Admittedly this building was used in part for a business purpose, namely, the keeping of a saloon. It is so charged in the affidavit of Conway, on which the search warrant was issued, and was not disputed either on the previous motion or on the trial. True, section 25 [this section] further provides that a private dwelling includes a 'room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel or boarding house.' Manifestly this building was not an apartment house, hotel, or boarding house, and no contention to that effect has been made by the defendant.

"It is apparent from the evidence in this case that the defendant keeps his supply of liquors upstairs in his living rooms and makes the sales downstairs in the saloon. A search of the saloon revealed nothing, as nothing intoxicating is kept therein. If it were necessary to show a sale upstairs

in defendant's living rooms, in order to search these rooms, they never could be searched, because no sales are made there. The Prohibition Law [incorporated in this title] would be difficult to enforce against saloon keepers, if they could keep their liquors in their living rooms on the second floor, sell them for immediate consumption on the first floor, and be immune from search and seizure on the second floor. It was undoubtedly to provide for just such a situation as exists here that the statute contained the provision, under section 25 [this section] that a private dwelling could not be searched unless used for unlawful sale, 'or unless it is in part used for some business purpose such as * * * saloon, * * *'" U. S. v. McGuire (D. C. N. Y. 1924) 300 F. 98.

A shed or outhouse on premises occupied by a dwelling house is not within the protection of this section, as a private dwelling, and is subject to search under a search warrant charging the unlawful manufacture of liquor therein. Monaghan v. U. S. (C. C. A. La. 1925) 5 F.(2d) 424.

Mere presence of mash, whisky, and still in private residence does not deprive it of its character as such. U. S. v. Mitchell (D. C. Tex. 1926) 12 F.(2d) 88.

Mere use of lean-to having dirt floor and crowded with distillery equipment as sleeping place for children would not make it private dwelling so as to require search warrant to be quashed. Id.

Evidence held sufficient to show that place searched for intoxicating liquors under warrant issued by state court was private dwelling of accused within this section, notwithstanding warrant referred to premises as house owned by one H., and that it was occupied as a "joint" by accused. Simmons v. U. S. (C. C. A. Okl. 1927) 18 F.(2d) 85.

Where property was seized on a search warrant from a public restaurant of defendant on the lower floor of a building on the upper floor of which was defendant's private dwelling, it was not found in his dwelling. U. S. v. Ketoorky (1922) 6 Alaska, 762.

Dwelling in which Liquor Manufactured

Issuance of search warrant for dwelling house, merely because it is used for unlawful manufacture of liquor, is unauthorized by this section. Staker v. U. S. (C. C. A. Ky. 1925) 5 F.(2d) 312; U. S. v. Jajeswiec (D. C. Mass. 1923) 285 F. 789.

An affidavit that intoxicating liquor is being manufactured on certain premises does not authorize the issuance of a search warrant for search of a private dwelling. To authorize the issuance of such a search warrant under this section, it must be shown that the place to be searched is not a private dwelling occupied as such, or, if such dwelling, that it is being used for the unlawful sale of intoxicating liquor, or is in part used for some business purpose. Jozwich v. U. S. (C. C. A. Ill. 1923) 288 F. 831.

Under the provision of this section that no search warrant shall issue to search any private dwelling unless used for the unlawful sale of intoxicating liquor, or used in part for some business purpose, such as a store, shop, saloon, restaurant, hotel, or boarding house, a private dwelling does not lose its character as such, and become a distillery, because a home-made still is found in operation upon a search. U. S. v. Kelih (D. C. Ill. 1921) 272 F. 484.

That the liquor is being manufactured for commercial purposes does not authorize warrant to search dwelling house. U. S. v. Palma (D. C. Mass. 1924) 295 F. 140, wherein the court said:

"The magistrate who issued the warrant and the prohibition agent who made the affidavit supporting it seem to have acted upon the assumption that the rule laid down in the above-cited cases would not apply if it appeared that the private dwelling house was being used for the manufacture of liquor for commercial purposes. It may well be that the affidavit in form does not come up to the requirements of the Giles Case (C. C. A. N. H. 1922) 284 F. 208, because it deals too much with conclusions and common report, and too little with facts; but, passing over this aspect of the case, I come to the broader, and more important aspect, namely, the question whether the rule in the above cases is to be limited to private dwellings where liquor is being manufactured on a small scale, and not for commercial purposes. This is the contention of the government, and it is apparently based upon the theory that a dwelling house ceases to be a private dwelling, and is no longer entitled to the protection of section 25 of the National Prohibition Act [this section] if any part of it (e. g., the cellar or the attic) is being devoted to the unlawful manufacture of liquor on such a scale as to justify the magistrate in believing that it was being manufactured for ultimate sale. If this theory can be supported at all, it must be on one of two grounds.

"First, that the dwelling was used in part for 'some business purpose,' within the meaning of this section; or,

"Second, that it was being used in part for a 'shop.'

"I have a feeling which approaches a conviction that this contention is not open on the Jajeswiec case, but apparently others have taken a different view, and I have therefore deemed it wise to give the matter further consideration.

"It seems to me that the legislative intent, as expressed in section 25 [this section] is clear. The right to search for liquor was not to be extended to a private

dwelling, unless it appeared that the dwelling house was used for the unlawful sale of intoxicating liquor, or unless it was in part used for some of the business purposes enumerated in the act. What are the business purposes enumerated in the act? The private dwelling must be used in part for a 'business purpose such as a store, shop, saloon, restaurant, hotel or boarding house'—all places where, as the experience of pre-prohibition days indicates, liquor might be sold, not places where it might be manufactured. Liquors are not manufactured in stores, shops, saloons, restaurants, hotels, or boarding houses. As I read the section, the dominant idea of those who framed it was to permit searches of private dwellings only where illegal traffic in liquor was discovered, or most likely to be found, and, by enumerating these places, Congress excluded all others. If it had intended to include the business of a brewery or distillery, it could easily have so provided. It cannot be seriously contended that Congress intended to permit the searching of private dwellings which were being used in part for any business purpose whatever.

"I can find no definition of the word 'shop' which could reasonably be held to include a distillery or a brewery, where ordinarily the business of manufacturing intoxicating liquors is carried on; nor do I find in any reported case any decision supporting the proposition that, if a still is found in a private dwelling, the dwelling is being used for a shop. The Jajeswiec and Kelih cases, above cited, point to quite the opposite conclusion. I am unable to adopt the view that, because a man sees fit to carry on an unlawful enterprise in his home, he thereby destroys the character of the house as his dwelling place. As has been frequently pointed out in cases arising under the Prohibition Act [incorporated in this title] the search warrant is the most drastic instrument which can be placed in the hands of an officer, and, when legislation is enacted extending the right to search and seize private dwellings, the courts ought not to lend their sanction to any interpretation of this legislation which will extend the right beyond the clear and obvious intent thereof. When application is made for a warrant to search a dwelling house which is not used for any of the business purposes enumerated in the act, it seems to me the first question for the magistrate to consider is whether the building is occupied in good faith as his home by the party whose premises are to be searched. If it should appear that the dwelling house was not being used as a bona fide place of abode, but merely as a cover for illegal manufacturing a different situation would be presented; but if it is in fact the private dwelling place of the defendant and is wholly used as such—that is, if it is not used in part for the business purposes mentioned in the section—it should not be searched, except upon evidence of sale."

75. Proceedings in general.—It is the duty of all United States commissioners to exercise scrupulous care that all proceedings before them and process issued by them in enforcing the National Prohibition Act (incorporated in this title), conform strictly to the search warrant provisions of section 611 et seq. of Title 18, Criminal Code and Criminal Procedure. Murby v. U. S. (C. C. A. R. I. 1923) 293 F. 849.

The commissioner, before issuing the warrant, must examine on oath the complainant and any witnesses he may produce, and must require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them. U. S. v. Rykowski (D. C. Ohio, 1920) 267 F. 866.

Commissioner, in finding probable cause for issuance of search and in issuing warrant, exercises judicial power granted by National Prohibition Act (incorporated in this title) and Act June 15, 1917, tit. 11 (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure). U. S. v. Elliott (C. C. A. Wash. 1925) 5 F.(2d) 292, affirming (D. C. 1924) 3 F.(2d) 496.

Proceedings before a commissioner, in which a search warrant is issued, are reviewable by the district court. U. S. v. Delcic (D. C. Wash. 1924) 2 F.(2d) 377.

But commissioner's determination of probable cause for search warrant is conclusive, unless arbitrary. Pappas v. Lufkin (D. C. Mass. 1927) 17 F.(2d) 988.

Commissioner must exercise own judgment as to whether facts in affidavit constitute probable cause for search warrant, and determination is conclusive, unless judgment is arbitrarily exercised. Gracie v. U. S. (C. C. A. R. I. 1926) 15 F.(2d) 644, certiorari denied (1927) 47 S. Ct. 449.

Certiorari is not available to review proceeding of United States commissioner in issuing a search warrant at instance of relator, who claims that there was no showing of probable cause to believe that petitioner was violating National Prohibition Act (incorporated in this title), and that warrant directed search and seizure of documents not particularly described, since relator's remedy under section 591 of Title 18, Criminal Code and Criminal Procedure, section 11 of this title, and sections 613, 616, 621, 623, 625 and 626 of Title 18, Criminal Code and Criminal Procedure, is right to controvert grounds on hearing before commissioner and proceedings for restoration of property seized if not prescribed in warrant or if there was no probable cause. U. S. v. Elliott

(C. C. A. Wash. 1925) 5 F.(2d) 292, affirming (D. C. 1924) 3 F.(2d) 496.

Where affidavit alleged that affiant saw whisky served and affidavit and search warrant definitely described premises and thing to be searched for, search and seizure thereunder were valid. Weeke v. U. S. (C. C. A. Mo. 1926) 14 F.(2d) 398, error dismissed and certiorari denied (1927) 47 S. Ct. 456, 71 L. Ed. ——.

Where two streets have the same name except that they are distinguished by the added words "north" and "south" a designation of the street on which the premises are located in affidavit and warrant by its common name without specifying whether "north" or "south" is insufficient. U. S. v. Rykowski (D. C. Ohio, 1920) 267 F. 866.

A description in an affidavit for a search warrant and in the search warrant of the property to be searched for and seized as "whisky and certain other intoxicating liquors, the exact kind and quantity of the same being at this time to affiant unknown," has been held sufficiently specific. U. S. v. Edwards (D. C. Mich. 1924) 296 F. 512.

In Pressley v. U. S. (C. C. A. Fla. 1923) 289 F. 477, a description in the affidavit and search warrant of the premises to be searched as "the premises and the buildings of a certain shoe shop, situate" in a named town, "being the premises of ——," on which premises accused was violating the National Prohibition Act (incorporated in this title) was held to be insufficient.

Mere fact that reading of warrant and affidavit would leave inference that building to be searched was one-family residence, when in fact it was a small apartment house was held not to render search warrant invalid, particularly where search was limited to part of premises in which illegal transactions in intoxicating liquors were established. U. S. v. Yablonsky (D. C. N. Y. 1925) 8 F.(2d) 318.

Uncontradicted testimony by a prohibition agent that the warrant under which he searched defendant's place of business and residence was issued by the clerk of the municipal court on a blank form issued by the court, and that the affidavit was based on a hearsay report, not on the affiant's own knowledge, shows that it was not issued by any one having authority to issue it, nor upon probable cause supported by affidavit. Salata v. U. S. (C. C. A. Ohio, 1923) 286 F. 125.

A proceeding for the issuance of a search warrant in liquor cases under the laws in force in Alaska cannot be considered a civil proceeding in the nature of a proceeding in rem. It is a proceeding of a semi-criminal nature, or rather ancillary or supplemental to a criminal action. U. S. v. Giovanetti (1921) 6 Alaska, 454.

The municipal magistrate of the city of Ketchikan had no power to issue a search warrant, and the city council of Ketchikan had no power to pass an ordinance authorizing him to issue a search warrant. U. S. v. Johnstone (1920) 6 Alaska, 323.

Objection to a search warrant issued under section 17 of the Alaska Prohibition Act (section 278 of Title 48, Territories and Insular Possessions) that it does not show the oath made by the complaining witness was made before the district attorney, or his authorized deputy. Held, that it is not necessary that the district attorney or his deputy should administer the oath; that the district attorney has no authority under the law to administer the oath. The reasonable construction of that requirement is that the words "charge under oath" should be construed so as to read "accused on oath before the district attorney"; in other words, that if a presentment on oath should be made to the district attorney, he should act. U. S. v. Giovanetti (1921) 6 Alaska, 454.

A search warrant was issued to search certain described premises, but neither the affidavit nor the search warrant named or disclosed the person charged, and did not present that any person, company, etc., has or have violated the act: Held, fatal omission, rendering the search warrant void, and the proceedings thereunder illegal; the warrant was quashed and all evidence obtained thereby was suppressed. Id.

76. Affidavits and other evidence—In general.—A search warrant must stand or fall on the sufficiency of the showing before the commissioner on which it is issued, and a valid warrant is not invalidated by failure to convict of the sale of liquor charged in the affidavit on which it was issued. U. S. v. McGuire (D. C. N. Y. 1924) 300 F. 98.

"It is not necessary, in order to have a search warrant under the National Prohibition Act [incorporated in this title] to set out in the affidavit that the property was used as a means of committing a felony, which is one of the grounds upon which a search warrant may issue under the Espionage Act [section 611 et seq. of Title 18, Criminal Code and Criminal Procedure]." U. S. v. Friedman (D. C. Pa. 1920) 267 F. 856.

Affidavit for search warrant to seize liquors must contain allegations which, if true, show a self-subsisting ground for the issuance of the warrant, and it is not enough that on the hearing before the commissioner under section 626 of Title 18, Criminal Code and Criminal Procedure, other grounds may appear, even though not on evidence extracted by the search itself, in view of section 615 of Title 18. U. S. v. Casino (D. C. N. Y. 1923) 286 F. 976.

Affidavits on which a search warrant is issued are not required to show facts sufficient to convict defendant of specified sales of intoxicating liquor, but it is enough if facts are shown to exist, show-

ing probable cause or reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a discreet and prudent man in believing that a crime is being committed. U. S. v. Lepper (D. C. N. Y. 1923) 288 F. 136, affirmed Lepper v. U. S. (C. C. A. 1924) 295 F. 1017.

Complaint and affidavit, on which search warrant was issued, and which positively stated that there was, on certain premises, which were sufficiently described, and which were the premises of defendant, certain liquors, in his possession, a more particular description of which was unknown, were sufficient to support the warrant. Sutton v. U. S. (C. C. A. Fla. 1923) 289 F. 488.

An affidavit which states no facts showing probable cause and contains no description of the property to be searched is insufficient as a basis for a search warrant. U. S. v. Carlson (D. C. Wash. 1923) 292 F. 463.

Insufficiency of affidavit for issuance of search warrant, under this section and sections 613, 625 and 626 of Title 18, Criminal Code and Criminal Procedure, could not be cured by testimony taken before commissioner as to facts omitted from affidavit. In re No. 191 Front St. Borough of Manhattan, City of New York (C. C. A. N. Y. 1924) 5 F.(2d) 282.

Every person is presumed to be a competent witness, and it is unnecessary, either in the affidavit or warrant or record, to show the competency of a person making the affidavit. Incompetency of a witness in such case must be shown by the party objecting thereto. U. S. v. Giovanetti (1921) 6 Alaska, 454.

Evidence used on application for search warrant to discover liquors under Const. Amend. 4, section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, and this section must be such as would be admissible on the trial of a case before a jury, and should not be such as "merely hearsay information." U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963. But in the case of In re Search of No. 15 East Third St. (D. C. N. Y. 1922) 284 F. 914, the court said:

"I cannot regard it as imperative that the only evidence which will justify the issuance of a search warrant and the seizure of property thereunder be common-law evidence. If that were so, it would be very difficult to sustain the granting of search warrants, or the seizure of property held for the purpose of violating the Volstead Act [incorporated in this title]."

Where affidavit for search warrant only showed that a truck loaded with whisky drove into defendant's garage, and did not show that the liquor was retained there, or the truck unloaded, insufficiency of the affidavit and the right of the government officers to retain the liquor was not affected by defendant's assertion of ownership on motion that the liquors be returned, because seized in violation of defendant's constitutional rights. U. S. v. Casino (D. C. N. Y. 1923) 286 F. 976.

Affidavits held sufficient as basis for issuance of search warrant under this section. Hurley v. U. S. (C. C. A. Mass. 1924) 300 F. 75.

An affidavit that affiant purchased intoxicating liquor in a place conducted as a saloon 4 days previously was held sufficient basis for issuance of a warrant to search the place for intoxicating liquor. Murby v. U. S. (C. C. A. R. I. 1924) 2 F.(2d) 56.

There is no fixed time after a sale of liquor within which a search warrant may be issued, and an affidavit charging a sale on premises described 12 days previously was held sufficient basis for a warrant to search the premises for liquor. U. S. v. McKay (D. C. Nev. 1924) 2 F.(2d) 257.

Affidavit as to single sale of liquor, more than two months prior to making of affidavit, was held insufficient for issuance of search warrant, especially in view of statutory provision making warrant void, unless executed and returned within 10 days after its date. Rupinski v. U. S. (C. C. A. Mich. 1925) 4 F.(2d) 17.

An affidavit in support of an application for search warrant which stated no facts tending to show probable cause for believing that the grounds for the application existed, and contained no statement that any books or documents tending to show unlawful sale of liquor were in the premises or on the person of defendant, named as proprietor, was held insufficient to authorize issuance of the warrant or the search of defendant's person, and seizure of papers and documents found thereon. Hagen v. U. S. (C. C. A. Wash. 1925) 4 F.(2d) 801.

Affidavit for search warrant, stating that property was being used for possession and sale of liquor, was held sufficient, and rendered evidence procured thereunder admissible. Maccieno v. U. S. (C. C. A. Ohio, 1925) 9 F.(2d) 61, reversed without opinion (1926) 46 S. Ct. 336, 270 U. S. 629, 637, 668, 70 L. Ed. 769.

Statements in complaint held not to justify issuance of search warrant, hence articles obtained in search thereunder were inadmissible. Siden v. U. S. (C. C. A. Minn. 1925) 9 F.(2d) 241, modified on rehearing (C. C. A. 1926) 14 F.(2d) 846.

Mere clerical error in affidavit in failing to change year date printed on blank form, was held not to vitiate search warrant based thereon. Pera v. U. S. (C. C. A. Mont. 1926) 11 F.(2d) 772.

Affidavit for search warrant, alleging person possessed still on described premises, was held sufficient. Giacolone v. U. S. (C. C. A. Wash. 1926) 13 F.(2d) 108, affirmed (C. C. A. 1926) 13 F.(2d) 110.

An affidavit held sufficient as basis for

issuance of a search warrant to search for intoxicating liquors. Forni v. U. S. (C. C. A. Cal. 1925) 3 F.(2d) 354.

77. —— Belief or conclusion of affiant.—It is insufficient for the issuance of a search warrant that an affiant or deponent shall swear, ever so positively, to the conclusion that liquor is stored in violation of law in a described building, without affirmatively stating the facts upon which such knowledge is founded, the determination of whether or not the facts proven satisfy of the existence of the grounds of the application or that there is probable cause to believe their existence being a judicial question, under Const. Amend. 4 and section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, which control under this section. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

The affidavit for the issuance of search warrants under this act must set forth the facts tending to establish the grounds of the application and probable cause for believing that they exist. Thus, a statement in such an affidavit that property purchased by a prohibition agent was designed and intended for use in the unlawful manufacture of intoxicating liquor, and was possessed and used in violation of this act, is a statement of a conclusion of the officer making the affidavit and not of a fact. And a further statement that a prohibition agent purchased on the premises two cans of malt extract, a still, some copper coil, and a bottle of whisky flavor, without a statement of other facts showing a criminal intent, is insufficient to show probable cause that this act was being violated on the premises. Atlantic Food Products Corp. v. McClure (D. C. Pa. 1922) 288 F. 982. See Lipschutz v. Davis (D. C. Pa. 1922) 288 F. 974, wherein an affidavit was held insufficient to show probable cause as basis for a search warrant, under this section, in that it stated the conclusions of affiant rather than facts.

Where an affiant merely swears that he has good reason to believe and does verily believe certain things but does not in any instance affirmatively swear that anything is true and does not state any facts or circumstances which will enable the United States commissioner to determine whether there was probable cause for his belief the affidavits are insufficient and a search warrant should not issue. U. S. v. Rykowski (D. C. Ohio, 1920) 267 F. 866.

An affidavit based on information and belief alone is insufficient as a basis for issuing a search warrant. U. S. v. Dziadus (D. C. W. Va. 1923) 289 F. 837, holding that an averment in an affidavit that three months previously a still was found on the premises was held insufficient to establish probable cause for believing that the premises were being used for the unlawful sale of liquor, which would authorize issuance of a search warrant for a private dwelling.

A search warrant cannot be issued under section 1195 of Title 26, Internal Revenue, based on information and belief of affiant, a federal prohibition agent, as those employed to enforce the National Prohibition Act (incorporated in this title) are not internal revenue officers, and are limited to the means of search provided for by that act, in view of this section and section 11 of this title. U. S. v. Spencer (D. C. Pa. 1923) 292 F. 871.

An affidavit which alleges that the affiant "has good reasons to believe and does believe" that intoxicating liquor is being sold on certain described premises by named persons and that there is a large quantity of intoxicating liquors upon the premises in the possession of such persons, is insufficient as a basis for the issuance of a search warrant, and intoxicating liquors seized under such a warrant will be ordered to be returned to the owner. U. S. v. Ray & Schultz (D. C. Mich. 1921) 275 F. 1004, wherein it was said:

"It is, of course, entirely clear that under the constitutional, as well as the statutory, provisions thus applicable the sufficiency and validity of the search warrant under consideration must be tested and determined by the result of the inquiry whether it was based upon a sworn statement of facts tending to show probable cause for the belief that proper ground for the issuance of such search warrant existed, or whether, on the other hand, the latter was based merely upon statements, although sworn to, of belief.

"Turning to the language of the affidavit in question, it is plain that the first paragraph thereof states merely the belief of the affiant and is wholly insufficient as a basis for the issuance of the search warrant sought, or, in fact, of any search warrant. Ripper v. United States (Mo. 1910) 178 F. 24, 101 C. C. A. 152; Veeder v. United States (Ill. 1918) 252 F. 414, 164 C. C. A. 338.

"Coming to a consideration of the second paragraph of the affidavit, it is, of course, obvious that, in so far as it is dependent upon or connected with the language of the first paragraph, it is subject to the objection applicable to the latter, as just stated, and is equally void as the basis of a search warrant. It is also apparent that, standing alone and unaided by the context, the words comprising this second paragraph are too indefinite and uncertain to satisfy the legal requirements of a statement of facts tending to show probable cause for believing that the ground for the issuance of a search warrant existed. It does not contain any allegation that the liquor re-

ferred to was intended for use in violating the National Prohibition Act [incorporated in this title] or that it had been or was being used for that purpose, or as the means of committing a felony, nor are any facts stated charging or describing any element of any known crime. An examination of the entire affidavit is convincing that all of it was based upon mere belief. It necessarily follows that the search warrant issued thereon was fatally defective and void."

An affidavit by a prohibition enforcement agent that he obtained from drums not labeled in the bottling house of a certain company "samples of liquid purporting to be cereal beverage; and that said samples obtained as aforesaid were tested and analyzed, and found to be intoxicating liquor fit for use for beverage purposes, and containing one-half of 1 per centum or more of alcohol by volume, and were then and there manufactured, sold, held, and possessed in violation of title II, sections 3 and 25, of the National Prohibition Act [section 12 of this title, and this section]" does not state "facts," within the meaning of this section and section 615 of Title 18, Criminal Code and Criminal Procedure, authorizing a search warrant to be issued. Central Consumers' Co. v. James (D. C. Ky. 1922) 278 F. 249.

In Giles v. U. S. (C. C. A. N. H. 1922) 284 F. 208, the body of the affidavit read as follows:

"Be it remembered that on this day, before me, the undersigned, a United States commissioner for the district of New Hampshire, came D. T. Lordan, Prohibition Agent, who, being by me duly sworn, deposes and says that the laws of the United States, namely, the National Prohibition Act [incorporated in this title] is being violated by reason of the facts, to wit: By the illegal possession and unlawful sale of intoxicating liquor at the drug store of D. F. Giles, on North Main street, Concord, New Hampshire, and the Hotel Lenox, occupied by the said D. F. Giles, on said North Main street, Concord, New Hampshire, and in a garage of the said D. F. Giles, situate in the rear of the drug store above mentioned, both being situate in the city of Concord and state of New Hampshire, and within the district above named." This affidavit was held insufficient. The court said:

"It is to be observed that this affidavit asserts baldly the illegal possession and unlawful sale of intoxicating liquor at three places, the defendant's drug store, the Hotel Lenox on the same street, also said to be occupied by Giles, but whether adjoining or not does not appear, and at the garage 'situated in the rear of the drug store.' This affidavit is challenged as being insufficient in law. The learned District Court in his memorandum denying the motions to quash and for a return of the property, stated his view as follows: 'A commissioner, having presented to him affidavits or evidence of the violation of a criminal statute, accompanied by a request for a search warrant, in considering such evidence, acts in a judicial capacity, and should issue such warrant only upon competent evidence such as would be admissible upon the trial of a case before a jury. The finding of probable cause for the issuance of a search warrant is one exclusively for the court or commissioner having the matter in charge.' This ruling seems to us plainly sound. But the difficulty we find is that the learned District Judge did not apply it in the case at bar. No lawyer would have suggested and no judge would have permitted, Lordan, testifying as a witness before a jury, to say that Giles was violating the National Prohibition Act [incorporated in this title], by having illegal possession of intoxicating liquor at his drug store. He would have been required to state what he saw, or heard, or smelled, or tasted; that is, to give evidence on which the jury, under instructions of the court, could determine both as to the possession of liquor, as to whether it was intoxicating liquor, and as to whether possession of it was legal or illegal. The fact that Lordan's affidavit was not, in form, on information and belief, and that he bravely swore that Giles had illegal possession of intoxicating liquor, does not make his statement legal evidence of facts. It is not enough that the form of this affidavit leaves it possible that the affiant might have personal knowledge as to the possession of intoxicating liquor and as to facts tending to show that such possession was illegal. It should have affirmatively appeared that he had personal knowledge of facts competent for a jury to consider, and the facts, and not his conclusion from the facts, should have been before the commissioner. Such is the plain requirement of section 5, supra [section 615 of Title 18, Criminal Code and Criminal Procedure]. Lordan's affidavit was, in its avoidance of a statement of facts for the judicial consideration of the commissioner, exactly adapted to create such a situation as was shown at the trial to exist in the case at bar. In fact, as Lordan testified at the trial, he had not been in Giles' drug store for three or four months. He knew nothing about the possession, legal or illegal, by Giles of intoxicating liquor, except as he heard rumors, or as complaints were made to him by one or more unnamed persons. That in this case these rumors appeared to have had some foundation is, for present purposes, immaterial. Our law does not contemplate that homes and business premises shall be

thus invaded, unless and until some person takes the responsibility of disclosing under oath to a judicial tribunal facts from which such tribunal—not the applicant or affiant—finds probable cause to believe articles particularly described, and properly seizable on search warrant, are in a place, also particularly described. In this case, as no facts whatever were put before the commissioner, he was ousted from his judicial function, and remitted to a performance purely perfunctory. The prohibition agent was applicant, affiant, in effect the judge of the existence of probable cause, and the officer serving the writ. This is a very dangerous amalgamation of powers."

In U. S. v. Harnich (D. C. Conn. 1922) 289 F. 256, it appeared that the warrant was issued on an affidavit stating no facts, but only that affiant, through investigation made by him and information he has obtained, "has reason to know and believe and does therefore know, believe, and aver," that the law is being violated. Holding that the warrant was invalid the court said:

"The facts set forth are nothing more than the affiant's application of his own undisclosed notion of the law to an undisclosed statement of facts. Under our system of government, the accuser is not permitted to be the judge. He has stated a conclusion of law which he is not entitled to draw. The conclusion as to whether or not a crime is being committed or the law violated is one which the judge or commissioner must determine, and it is a duty which cannot be delegated to the accuser. The affidavit amounts to the conclusion merely that the law is being violated. No facts at all appear. The affiant does not swear to anything for which he could be prosecuted, as his affidavit contains only what he derives from information.

"The purpose of such strict conformity with the requirements of the law is perfectly obvious. The affidavit is required for the very purpose of fixing the responsibility for so serious a charge in the event that the affiant has sworn falsely. When he says he 'verily believes upon information, and therefore avers,' and fails to disclose the information, no responsibility attaches to him in the event the information turns out to be incorrect. A man cannot be convicted of perjury for swearing that he believes a certain thing to be so. If he could do this, an irreparable wrong might be done, for which there would be no remedy."

Affidavit for search warrant alleging grounds for belief of violation of liquor laws was held sufficient in Fry v. U. S. (C. C. A. Wash. 1925) 9 F.(2d) 38, certiorari denied (1926) 46 S. Ct. 347, 270 U. S. 646, 70 L. Ed. 778.

Allegations in affidavit of officer, supporting search warrant, that he saw a commercial car drive up to garage and saw unloaded therefrom several five-gallon cans which appeared to contain alcohol and that a very strong odor of alcohol emanated from garage, without stating facts justifying conclusion that alcohol was fit for beverage purposes, was held not to justify issuance of warrant. U. S. v. Milano (D. C. Conn. 1926) 17 F. (2d) 334.

78. —— **Identification or description of premises or property.**—Evidence designating the building to be searched only by street and number is insufficient to furnish the particular description of the place to be searched, required by section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, under which a search warrant for liquors unlawfully possessed must be sought by a provision of the Volstead Act (incorporated in this title), where it appeared that the building so designated was occupied by more than one tenant, so that it was in fact several places. U. S. v. Innelli (D. C. Pa. 1923) 286 F. 731. But an affidavit on which a search warrant is issued has been held to sufficiently describe the premises to be searched where the property is described by street and number, and it is stated that they are occupied as a saloon and dwelling. U. S. v. Friedman (D. C. Pa. 1920) 267 F. 856.

An affidavit for a search warrant by prohibition agents, describing premises as No. 1608 B. avenue, the legal number, was sufficient, though the place was marked 1608½. U. S. v. Harvey (D. C. Wash. 1924) 298 F. 106.

"Upon application for search warrant, to show probable cause to search for evidence of a particular offense, the proof must show the particular article or objects it is sought to obtain." U. S. v. Boyd (D. C. Wash. 1924) 1 F.(2d) 1019.

Affidavit for issuance of search warrant, under this section, and sections 613, 625 and 626 of Title 18, Criminal Code and Criminal Procedure, not describing record, papers, or memoranda of any kind, and not referring to use of records in connection with sale of liquor, except in so far as it stated that affidavit was made to procure warrant for search of described premises and for seizure of "liquors found therein, together with any books, papers, records, or documents pertaining to the sale, possession, or transportation of intoxicating liquors," neither identified records nor alleged probable cause for their seizure, so that warrant issued thereon, so far as it authorized seizure of such records, violated Const. Amend. 4. In re No. 191 Front St. Borough of Manhattan, City of New York (C. C. A. N. Y. 1924) 5 F. (2d) 282.

79. —— **Sufficiency of evidence of probable cause.**—Where prohibition agent, ex-

perienced in liquor prosecutions and seizures of liquor, saw name "whisky" stenciled on cases similar to whisky cases, and ascertained, by his own investigation of official records, that there was no permit for the legal storage of whisky on the premises, there was probable cause for issuance of search warrant and seizure of the liquor, under this section and section 611 et seq. of Title 18, Criminal Code and Criminal Procedure. Steele v. U. S. (1925) 45 S. Ct. 414, 267 U. S. 498, 69 L. Ed. 757.

Affidavit on which search warrant was issued, wherein affiant alleged purchases of wine in grocery store adjoining winery operated under government permit, under circumstances indicating that wine purchased was obtained from winery, was held sufficient to establish probable cause for issuance of search warrant under this section, and sections 615 and 626 of Title 18, Criminal Code and Criminal Procedure, and Const. U. S. Amend. 4; "probable cause" being reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant cautious man in belief that party is guilty of offense charged. Dumbra v. U. S. (1925) 45 S. Ct. 546, 268 U. S. 435, 69 L. Ed. 1032.

Affidavits which are made by a federal prohibition agent and which set out that the premises are occupied as a saloon and dwelling, that on a day and hour stated the affiant purchased intoxicating liquor there, and which further set out the kind and quantity of liquor purchased, and that it contained one-half of 1 per cent. or more of alcohol, also setting out the sum paid for the liquor, state facts on which the commissioner can find probable cause to believe that an offense against the National Prohibition Act (incorporated in this title), has been committed on the premises and which will justify the issuance of a search warrant. U. S. v. Friedman (D. C. Pa. 1920) 267 F. 856.

An affidavit that a truck loaded with whisky drove into defendant's garage was not enough to give the right forcibly to search the premises two days later; it not appearing that the garage was a private one, or that the liquor was removed from the truck. U. S. v. Casino (D. C. N. Y. 1923) 286 F. 976.

Evidence lawfully obtained that one holding a wholesale permit to sell certain described liquors at his place of business later had less than such quantity at such place, with no valid permits to purchasers on file, but a number of forged permits, and that he had not made the requisite returns of sales, was held sufficient to show probable cause and to authorize issuance of a search warrant. Lipschutz v. Quigley (D. C. Pa. 1923) 287 F. 395.

A showing that defendant had been under surveillance by prohibition agents for smuggling intoxicating liquor into the country, that during the nighttime motor cars and trucks as late as 2 o'clock in the morning were observed stopping at defendant's premises, delivering or receiving quantities of bottles and cases, together with the clandestine nature of the operations carried on in and around the private dwelling, was sufficient to warrant the issuance of a search warrant to search the premises for intoxicating liquors. U. S. v. Lepper (D. C. N. Y. 1923) 288 F. 136, affirmed, Lepper v. U. S. (C. C. A. 1924) 295 F. 1017.

Affidavit by prohibition officer that he had good reason to believe and did believe that on premises designated liquor would be found, and that his information was obtained from affidavits made by stated persons, which were before the magistrate and showed purchases of whisky, was held to sufficiently show existence of probable cause to legalize warrant. Hawker v. Queck (C. C. A. Pa. 1924) 1 F.(2d) 77, certiorari denied Queck v. Hawker (1924) 45 S. Ct. 99, 266 U. S. 621, 69 L. Ed. 472.

Affidavits describing comparatively recent sales of whisky on premises used as cabarets, by or with the approval of the management, were held sufficient to show probable cause for issuance of search warrants under this section and section 611 et seq. of Title 18, Criminal Code and Criminal Procedure. In re Hollywood Cabaret (C. C. A. N. Y. 1925) 5 F.(2d) 651.

Affidavit stating positively that there was located on premises used for a soft drink parlor and grocery store illicit distilling apparatus, etc., in which intoxicating liquor was kept and stored, were held sufficient to authorize issuance of search warrant to search such premises. Boehm v. U. S. (C. C. A. Ill. 1925) 6 F. (2d) 497.

Under this section and sections 613 to 615 of Title 18, Criminal Code and Criminal Procedure, search warrant was issued without "probable cause," so that evidence obtained thereby was incompetent on prosecution for possession of liquor at the place searched; affidavit and complaint, stating as basis, other than conclusions, only that 43 days before liquor was purchased there, this not being self-sufficient to show a present existing cause. Dandrea v. U. S. (C. C. A. Minn. 1925) 7 F.(2d) 861.

Affidavit of prohibition agent, showing that all samples of beer taken by him from barrels on premises of brewing company while operating under permit had more than one-half of 1 per cent. alcohol was sufficient evidence of probable cause for issuance of search warrant. Daeufer-Lieberman Brewing Co. v. U. S. (C. C. A. Pa. 1925) 8 F.(2d) 1.

Affidavit for search warrant, "made on the personal knowledge of affiant" (a prohibition agent), by reason of having in his possession a formal affidavit made by a police officer, which set forth a conversa-

tion between such officer and defendant, to effect that defendant had on premises involved "two safes which contained bonded liquor, and which are known to be untax-paid," held insufficient on which to base finding of probable cause, under this section, and sections 613 to 615 of Title 18, Criminal Code and Criminal Procedure. Wagner v. U. S. (C. C. A. Mo. 1925) 8 F.(2d) 581.

Affidavits of prohibition agents, reciting purchase of whisky in soft drink parlor, and that intoxicating liquor was unlawfully kept and used on premises, held sufficient to authorize issuance of search warrant. Pera v. U. S. (C. C. A. Mont. 1926) 11 F.(2d) 772.

Affidavit that deponent purchased colored distilled spirits in soft drink saloon held sufficient showing of probable cause for issuance of search warrant. U. S. v. Wuerstle (D. C. N. Y. 1926) 13 F.(2d) 952.

Search warrant, based on affidavit of prohibition agent to effect that he had detected odor of alcohol while standing in front entrance of garage, held not based on probable cause that intoxicating liquors fit for beverage purposes were unlawfully possessed therein as required by section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, as condition precedent to issuance of search warrant. U. S. v. Roma (D. C. Mass. 1926) 17 F.(2d) 270.

Affidavit of prohibition agents held to show probable cause for search of brewery premises. U. S. v. Callahan (D. C. Pa. 1927) 17 F.(2d) 937.

Evidence of probable cause for issuance of search warrant by state court, under which evidence in federal prosecution was obtained, must meet requirements of section 611 et seq. of Title 18, Criminal Code and Criminal Procedure. Simmons v. U. S. (C. C. A. Okl. 1927) 18 F.(2d) 85.

Where the affidavit for a search warrant discloses that the affiant saw men drinking from containers on the premises, and as a result thereof the men became intoxicated, and in the premises saw men receive alcoholic liquors from the defendant and drinking liquors which had the effect of intoxication, there is sufficient evidence of probable cause for the issuance of a search warrant. U. S. v. Giovanette (1921) 6 Alaska, 454.

An affidavit for a search warrant which stated that affiant personally saw defendant carry a basket of bottles of whisky from the premises to be searched and knew that intoxicating liquor was possessed and sold there was sufficient to authorize the issuance of the warrant under federal laws. Walters v. Commonwealth (Ky. 1923) 250 S. W. 839.

80. —— Sufficiency to authorize search of dwelling.—An application for a warrant under this section to search a private dwelling should allege facts showing probable cause to believe intoxicating liquor is being manufactured on the premises for commercial purposes; such manufacture being "business purpose," which takes from a dwelling its private character. An affidavit reciting that the affiant on investigating defendant's dwelling detected a strong odor of fermenting mash has been held an insufficient showing of probable cause that liquor was being unlawfully manufactured therein to warrant a search warrant. U. S. v. Goodwin (D. C. Cal. 1924) 1 F.(2d) 36.

In the following extract from the opinion of the court affidavits containing the facts there recited were held to meet the requirements of the statute and to authorize the commissioner to find probable cause: "We find no merit in the contention that the commissioner acted in an unauthorized manner in finding probable cause for issuing a warrant. It was applied for by a prohibition agent, accompanied by the affidavit of a police officer in the city of Worcester, in the district of Massachusetts, in which the officer stated that, at different times, he had seen men enter the tenement in Worcester of the plaintiff in error and emerge therefrom within a reasonable time in an intoxicated condition; that upon one day shortly before the warrant was issued he saw ten men enter this tenement within 40 minutes, and on six days before the warrant was issued he saw nine men go into it and three come out intoxicated; that upon the same day he saw two men go to the door of the tenement, who were met by the plaintiff in error and told by him, in answer to an inquiry for beer from one of them, 'I am sorry, boys, I am all sold out;' and that he had smelled a strong odor of distilled liquor coming from the premises at least twice." Hurley v. U. S. (C. C. A. Mass. 1924) 300 F. 75.

Prohibition officer's affidavit that he had smelled fumes from still making intoxicating liquor, and had reasonable grounds to believe and did believe that intoxicating liquors were being sold, manufactured, and disposed of, or illegally possessed in house (describing it), held not to state facts constituting probable cause to believe that house was being used for sale of liquor, or any business purpose, so as to authorize warrant to search private dwelling, under this section. Staker v. U. S. (C. C. A. Ky. 1925) 5 F.(2d) 312.

Application and affidavit for search warrant for search of a dwelling under this section held, by statement of matters seen and overheard, to make the necessary showing of probable cause of sale of liquor. U. S. v. Olmstead (D. C. Wash. 1925) 7 F.(2d) 760.

Affidavit held to state facts sufficient to form a basis for probable cause to believe that a private dwelling was being used for the unlawful sale of intoxicating liquor

and to authorize issuance of a search warrant under this section. U. S. v. Kasprowitz (D. C. Mich. 1926) 14 F.(2d) 193.

Federal search warrant, issued on affidavit stating no facts tending to show use of dwelling for unlawful sale of intoxicating liquors or in part for business purpose, as required by this section, held invalid, and evidence obtained by federal officers, acting thereunder, inadmissible. Roberts v. Commonwealth (Ky. 1924) 266 S. W. 880, 206 Ky. 75.

81. —— **Sufficiency to authorize search at night.**—A positive averment in an affidavit for a search warrant that "deponent further states upon his own knowledge that in and upon the premises aforesaid * * * is now a certain quantity of intoxicating liquor fit for beverage purposes * * * used in connection with the aforesaid violation of the National Prohibition Act [incorporated in this title]" is sufficient, under section 620 of Title 18, Criminal Code and Criminal Procedure, to support a direction that the warrant be served at any time of day or night. U. S. v. Edwards (D. C. Mich. 1924) 296 F. 512.

Under section 620 of Title 18, Criminal Code and Criminal Procedure, under which search warrants for liquor unlawfully possessed must be issued, and which requires that the warrants shall be served in the daytime, unless the affidavits are positive that the property is in the place to be searched, in which case the warrant may direct that it may be served either in the daytime or nighttime, an affidavit stating positively that defendant had taken whisky from the premises in question, and that whisky was unlawfully possessed and sold there, was sufficient to authorize permission to search in the nighttime. Walters v. Commonwealth (1923) 250 S. W. 839, 199 Ky. 182.

82. —— **Manner of obtaining evidence.**—Admissibility, on trial, of evidence wrongfully obtained, see notes 131 to 139, under this section.

Information obtained during the course of a search made under an illegal search warrant cannot be used as a basis for obtaining a second search warrant. Thus, where a residence is searched under a warrant describing differeat premises and obtained on evidence insufficient to authorize the issuance of a warrant to search the premises actually searched, the fact that the officers found intoxicating liquor on the premises during the course of the illegal search cannot be used in applying for a second warrant. U. S. v. Boasberg (D. C. La. 1922) 283 F. 305, writ of error dismissed (1923) 43 S. Ct. 246, 260 U. S. 756, 67 L. Ed. 498.

Information acquired by an internal revenue officer on lawful inspection of the premises of the holder of a permit to sell liquors is lawfully obtained, and may be made the basis of a search warrant. Lipschuts v. Quigley (D. C. Pa. 1923) 287 F. 395.

Where prohibition agents, trained to detect intoxicating liquor, and especially beer, observed steam rising from engine room of brewery, and smoke from smokestack, and detected strong odors of hop and mash and beer, the fact that their information was obtained while on premises without search warrant, for purpose of requesting admission, did not prevent use thereof in obtaining search warrant, and evidence obtained thereunder was admissible. Nicholson v. U. S. (C. C. A. Ill. 1925) 6 F.(2d) 569.

Where federal prohibition agent entered in daytime yard and buildings where defendant carried on a junk business, and without defendant's knowledge discovered alcohol illegally possessed, information so obtained could be used in obtaining search warrant. U. S. v. Bloom (D. C. Mass. 1925) 6 F.(2d) 584.

83. —— **Subornation of perjury.**—Indictment for subornation of perjury alleged to have been made in application for search warrant under the National Prohibition Act (incorporated in this title) held sufficient. Link v. U. S. (C. C. A. Mich. 1924) 2 F.(2d) 709.

84. **Warrant—In general.**—Under Const. Amend. 4, and section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, which control under this section, every search warrant should be full and complete in itself, should contain the name or description of the person whose premises are to be searched and a particular description of the property to be sought and of the place to be searched, and should state the particular ground or probable cause for its issue, and the names of the persons whose affidavits (or depositions) have been taken in support thereof, should direct that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case the warrant may contain a direction that it be served at any time of the day or night, and should direct that it be executed and returned to the judge or commissioner who issued it within 10 days after its date. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

A search warrant is not invalid because it does not in express terms direct the officer to bring the property seized before the commissioner, but instead directs that he make such disposition of it as required by law. U. S. v. Edwards (D. C. Mich. 1924) 296 F. 512.

Section 620 of Title 18, Criminal Code and Criminal Procedure authorizing a direction in a search warrant that it be served at any time of the day or night if it is positively shown by affidavit that the property is on the person or in the place to be searched, does not require the

positive averment of the affidavit to be recited in the warrant. An officer is justified in executing a search warrant in the nighttime, if it is so directs and is regular on its face, and a seizure thereunder is legal, even though such direction was not authorized. Gandreau v. U. S. (C. C. A. R. I. 1924) 300 F. 21.

Under Const. Amend. 4, and section 611 et seq. of Title 18, Criminal Code and Criminal Procedure which control under this section as regards search warrants, it has been held that if the name of the person from whom the property is to be taken is known, it should be so stated, but, if not possible, a description of him should be used; if, however, the property sought is not in the possession of any one so far as can be ascertained, this should not prevent search and seizure, and it is permissible to recite that the owner of the premises or property is unknown. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

But in another case it was held that under section 613 of Title 18, Criminal Code and Criminal Procedure which is incorporated into this section and which provides that "a search warrant cannot be issued but upon probable cause, supported by affidavit naming or describing the person, and particularly describing the property and the place to be searched," if the warrant is for the search of a person, the person must be named or described, and the thing to be searched for and seized particularly described; if for the search of a place, the place must be particularly described, as well as the thing to be there searched for and seized, but in such case it is not necessary to name or describe the owner or occupant. Gandreau v. U. S. (C. C. A. R. I. 1924) 300 F. 21. The court said:

"In this case the search warrant was not to search a person, but to search a place. There can be no question but that the place to be searched was particularly described in the warrant, and we are of the opinion that, as the statute does not require the name of the owner or occupant of the premises to be stated in the warrant, the place to be searched being otherwise particularly described, the first four grounds of objection cannot be sustained."

In Giles v. U. S. (C. C. A. N. H. 1922) 284 F. 208, the body of the search warrant read as follows:

"Whereas, complaint on oath, and in writing, supported by affidavit, has this day been made before me, Burns P. Hodgman, a United States commissioner for the said district, by D. T. Lordan, Prohibition Agent, alleging that the laws of the United States, namely, the National Prohibition Act [incorporated in this title] have been and are being violated by unlawfully possessing and selling intoxicating liquor at the drug store of D. F. Giles, on North Main street, Concord, New Hampshire, and the Hotel Lenox, occupied by the said D. F. Giles, on said North Main street, Concord, New Hampshire, and in a garage of the said D. F. Giles situate in the rear of the drug store above mentioned, and being situate in the city of Concord and state of New Hampshire and within the district above named.

"You are therefore hereby commanded, in the name of the President of the United States, to enter said premises in the day or night time, with the necessary and proper assistance, and there diligently to investigate and search into and concerning said violations, and to report and act concerning the same as required of you by law."

This warrant was held insufficient. The court said:

"It describes apparently three buildings —a drug store, a hotel, and a garage in the rear of the drug store. It is at least doubtful whether a description of three buildings—one of them a hotel—how large and to what extent occupied by guests or dwellers does not appear—does not bring the search warrant within the condemnation always visited in modern times on general search warrants. Compare State v. Duane (1905) 100 Me. 447, 62 A. 80; 1 Bishop's Criminal Procedure, § 209. Moreover, there is in this search warrant no mandate to seize any property, much less any specific description of the property to be seized. The direction is that the officer shall 'enter said premises in the day or night time, with the necessary and proper assistance, and there diligently to investigate and search into and concerning said violations, and to report and act concerning the same as required of you by law.'

"This language, requiring the officer 'to investigate and search into and concerning said violations,' is very far from being a direction to go to a particularly described place and there to seize particularly described property and to bring the same before a magistrate. It is far more like a direction that might properly be given to a detective than like a mandate to an officer of the law to exercise one of the most drastic and offensive powers of government. There is no provision in the warrant requiring it to be executed and returned within 10 days. While it may be argued that the requirement that the officer 'shall report and act concerning the same as required by law' is by implication a provision for a return, so as to relieve the warrant of one of the objections urged by Otis against the writs of assistance (see the Boyd Case [N. Y. 1886] 115 U. S. 616, 622, 626, 6 S. Ct. 524, 29 L. Ed. 746), yet the great weight of authority is that the warrant should be specific and complete within itself. The officer serving it should not be left to ascertain and judge of the requirements of the law. Nor in the search warrant

used in this case was there adequate compliance with the requirements of section 6, supra [section 616 of Title 18, Criminal Code and Criminal Procedure] requiring that the warrant itself should state 'the particular ground or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof.' Nor was there the positive proof required by section 10, supra [section 620 of Title 18] for a search warrant that may be served in the night."

"The authority to issue federal search warrants is not inherent in any federal court, and the directions given to the officer executing the warrant must strictly comply with the statute authorizing the issuance. * * *

"There can be no reason in law why a search warrant under the National Prohibition Act [incorporated in this title] must not also be made to follow the exact language and requirements of the statute. The warrant at bar commands the officer—'to enter said premises * * * and there diligently to investigate and search into and concerning the violations as aforesaid and to report and act concerning the same as required of you by law.' The statute authorizes the issuance, under a proper state of facts, of a warrant, to a proper officer—'commanding him forthwith to search the person and place named, for the property specified, and to bring it before the judge or commissioner.' The warrant at bar is therefore fatally defective in this particular. Giles v. U. S., supra (C. C. A. N. H. 1922) [284 F. 208]. It may be said that under these conclusions persons suspected of violations of the Federal Prohibition Act [incorporated in this title] are given greater security against searches of their persons, their houses, their papers and effects, than is accorded suspected violators of the revenue laws and the counterfeiting laws. If such conclusions are correct, Congress has provided such additional security, and it is not the province of any law enforcement officer to violate that security." U. S. v. Dziadus (N. D. W. Va. 1923) 289 F. 837.

Search warrants sworn out before a United States commissioner, by official charged with duty of enforcement of National Prohibition Law (incorporated in this title) and setting forth belief and reason why search should be made, what was being searched for, and where same was believed to be, held sufficient in form and substance, and resistance to federal prohibition enforcement officer, attempting to make search thereunder, constituted offense denounced by section 245 of Title 18, Criminal Code and Criminal Procedure. Talbert v. U. S. (C. C. A. W. Va. 1925) 6 F.(2d) 570.

Search warrant for brewery premises was held not invalid because not issued until thirteen days after making of affidavit. U. S. v. Callahan (D. C. Pa. 1927) 17 F.(2d) 937.

85. —— Recitals as to probable cause and evidence thereof.—Under Const. Amend. 4, section 611 et seq. of Title 18, Criminal Code and Criminal Procedure and this section, the names of deponents, as well as of the affiants, must be inserted in a search warrant; the word "affidavits" embracing "depositions." U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

If affidavits on which a search warrant is issued meet constitutional requirements, the failure of the issuing magistrate to state in the warrant that he found probable cause will not render the search illegal, under the Constitution or sections 613 and 614 of Title 18, Criminal Code and Criminal Procedure, existence of probable cause, and not finding it, being essential to the legality of a warrant, which existence must be disclosed by the affidavit. Hawker v. Queck (C. C. A. Pa. 1924) 1 F.(2d) 77. Certiorari denied Queck v. Hawker (1924) 266 U. S. 621, 45 S. Ct. 99, 69 L. Ed. 472.

An express finding of probable cause in the warrant itself, or in the court records, is not necessary. The fact that a search warrant is issued by a justice of the peace is in itself a finding of probable cause by him. U. S. v. Giovanette (1921) 6 Alaska, 454.

Search warrant, reciting that information had been laid by federal prohibition agent that accused had possession of intoxicating liquor on his premises for purpose of sale, in violation of Alaska Dry Law (section 261 et seq. of Title 48, Territories and Insular Possessions) and National Prohibition Act (incorporated in this title) in connection with agent's affidavit that he had purchased whisky on premises, held to show finding of probable cause. Baker v. U. S. (C. C. A. Alaska, 1925) 4 F.(2d) 805.

Search warrant issued by state court, reciting affiant's belief that liquor was sold in dwelling, held insufficient basis for federal search and seizure. Simmons v. U. S. (C. C. A. Okl. 1927) 18 F.(2d) 85.

86. —— Designation of premises or property.—Description in search warrant issued under this section and section 611 et seq. of Title 18, Criminal Code and Criminal Procedure is sufficient, if such that officer with warrant can with reasonable effort ascertain and identify the place intended. Steele v. U. S. (N. Y. 1925) 45 S. Ct. 414, 267 U. S. 498, 69 L. Ed. 757.

A search warrant issued under this section, is required to describe the property to be searched for only with reasonable certainty; a particular, detailed description being unnecessary and in many cases impossible. U. S. v. Gaitan (D. C. Cal. 1925) 4 F.(2d) 848.

Description, in search warrant issued

under this section, and section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, of building to be searched as "garage located in the building at" a specified address, and stating that "this building is used for business purposes only," was held sufficient for search of entire building, including rooms on floors other than that used for garage purposes, connected with garage by elevator. Steele v. U. S. (1925) 45 S. Ct. 414, 267 U. S. 498, 69 L. Ed. 757.

Description, in warrant of "cases of whisky" was held sufficiently specific to warrant seizure of whisky and other intoxicating liquor found in search of premises. Id.

A search warrant for the search of a dwelling was not invalid as not specifically describing the apartments to be searched, because other tenants occupied the upstairs apartments, where the downstairs part of the dwelling, where the intoxicating liquor was seized, was occupied by the defendant, and one of the upstairs tenants was held by the commissioner before whom the warrant was returnable for aiding and abetting the co-defendant. U. S. v. Lepper (D. C. N. Y. 1923) 288 F. 136, affirmed Lepper v. U. S. (C. C. A. 1924) 295 F. 1017.

A warrant ordering a search of premises bounded by four streets, "having located thereon a * * * brewery," when the block described included grocery, meat market, and dwelling houses of disinterested persons, as well as the brewery, has been held invalid, as too general. U. S. v. 2,615 Barrels, etc. (D. C. Pa. 1924) 1 F.(2d) 500.

Where search warrant described premises as 2310½ Seventh avenue, premises of named parties, and testimony disclosed no such number, and the second floor over 2308, 2310, or 2312 was searched, these three numbers being over three separate doors on Seventh avenue, and premises were a private residence, not of the parties named, premises were held not sufficiently described nor identified by proof. U. S. v. Sands (D. C. Wash. 1926) 14 F.(2d) 670.

In a search warrant issued under this section, description of the articles to be searched for as "certain intoxicating liquor, containers for the same and property used in the manufacture of intoxicating liquor" was held sufficiently specific to comply with the requirements of Const. Amend. 4, and section 613 of Title 18, Criminal Code and Criminal Procedure. U. S. v. Kaplan (D. C. Mass. 1926) 16 F.(2d) 802.

Description of a brewery in a search warrant was held sufficient, where it was correctly described, except that the premises were stated to be bounded on the east by a railroad right of way and on the west by a named street, whereas the street was on the east and the railroad on the west side of the property; there being no other brewery in the vicinity. U. S. v. Callahan (D. C. Pa. 1927) 17 F.(2d) 937.

Search warrant issued commanding the marshal to search the San Francisco Bakery Building for intoxicating liquor alleged to be concealed therein by the defendant; objection is made that the San Francisco Bakery Building is a three-story building, each separate floor or story of which was occupied by separate families as their dwelling places. Held sufficient because the affidavit sets forth that the building is occupied by the defendant, and alleged that he has concealed therein alcoholic liquors—a sufficient description of the premises to be searched. U. S. v. Giovanette (1923) 6 Alaska, 454.

87. —— Persons to whom issued or addressed.—A general prohibition agent appointed by the Commissioner of Internal Revenue is a "civil officer" to whom a search warrant is authorized to be issued by the Espionage Act (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure) adopted by this section. Steele v. U. S. (N. Y. 1925) 267 U. S. 505, 45 S. Ct. 417, 69 L. Ed. 761.

To the same effect see Dumbra v. U. S. (N. Y. 1925) 268 U. S. 435, 45 S. Ct. 546, 69 L. Ed. 1032; Dovel v. U. S. (C. C. A. Ill. 1924) 299 F. 948; Raine v. U. S. (C. C. A. Nev. 1924) 299 F. 407, certiorari denied (1924) 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467; U. S. v. Edwards (D. C. Mich. 1924) 296 F. 512; U. S. v. American Brewing Co. (D. C. Pa. 1924) 296 F. 772; U. S. v. Loeffelman (D. C. Minn. 1924) 297 F. 472; U. S. v. Montalbano (D. C. Tex. 1924) 298 F. 667; U. S. v. Syrek (D. C. Mass. 1923) 290 F. 820; Daeufer-Lieberman Brewing Co. v. U. S. (C. C. A. Pa. 1925) 8 F.(2d) 1. Contra, U. S. v. Musgrave (D. C. Neb. 1923) 293 F. 203.

It is not necessary that a search warrant be directed to a particular officer by name, and a warrant directed to the marshal of the district, "or any of his deputies, or any federal prohibition agent, or any civil officer of the United States duly authorized to enforce any law thereof," has been held valid. Gandreau v. U. S. (C. C. A. R. I. 1924) 300 F. 21, wherein the court said: "The warrant in this case was directed to the 'United States marshal for the district of Rhode Island, or any of his deputies, or any federal prohibition agent, or any civil officer of the United States, duly authorized to enforce any law thereof.' The fifth objection is that the warrant was not directed to a particular officer by name. In support of this objection the defendant relies on section 6 [section 616 of Title 18, Criminal Code and Criminal Procedure] wherein the judge or commissioner is required to issue the search warrant 'to a civil officer of the United

States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the president of the United States,' as though it required that the warrant be issued to a particular officer by name. But we do not think section 6 should be so construed, for section 7 [section 617 of Title 18] provides that 'a search warrant may in all cases be served by any of the officers mentioned in its direction, but no other person, except,' etc., clearly contemplating that the warrant may be directed to certain officers for service, and served by any one of them."

Search warrants directed to a named federal prohibition agent "and his assistants, or any or either of them," were held invalid, there being no such officer as an assistant to a federal prohibition agent. Leonard v. U. S. (C. C. A. Mass. 1925) 6 F.(2d) 353.

88. Amendment of warrant.—Search warrants are of such grave importance that they may be amended, if at all, only by the officer issuing them, and then only in conformity with the affidavits or depositions upon which they are based. They cannot be amended by the officers on a telephone communication from the commissioner. U. S. v. Mitchell (D. C. Cal. 1921) 274 F. 128.

89. Vacating or quashing warrant.—A judgment upholding a search warrant on a petition to vacate it is res judicata as to the competency of the person to whom the warrant was directed and as to probable cause for its issuance; so that the petitioner cannot subsequently raise the question in a criminal proceeding against him by objecting to evidence of seizure under the warrant. Steele v. U. S. (N. Y. 1925) 267 U. S. 505, 45 S. Ct. 417, 69 L. Ed. 761.

Upon a motion to quash a search warrant and for return of liquor seized under it, upon the ground that the warrant was issued without probable cause, in violation of the Fourth Amendment, because of the alleged inadequacy of the evidence set forth in the affidavit, the question whether, on trial had, the government may succeed in condemning the liquor seized is not presented. Dumbra v. U. S. (N. Y. 1925) 268 U. S. 435, 45 S. Ct. 546, 69 L. Ed. 1032.

Where a seizure of liquors and books and papers was illegal because made on a search warrant afterward vacated by the commissioner who issued it, a motion to impound the property will be denied. U. S. v. Porazzo (D. C. N. Y. 1921) 272 F. 276.

It has been held that action of commissioner in denying a motion to quash a search warrant and return liquor seized under it is not the action of the federal district court, and a motion may be made in such court to correct the action of the commissioner, and in a proper case the court may direct a return of the property, under this section and certiorari is unnecessary, as on such motion the court is vested with the powers conferred on the commissioner by sections 625 and 626 of Title 18, Criminal Code and Criminal Procedure. U. S. v. Casino (D. C. N. Y. 1923) 286 F. 976. But in another case it was held that search warrant proceedings before a commissioner are not in the District Court, and it is not proper procedure for that court on motion to order the commissioner to certify up his record for a review of his ruling on a motion to quash a search warrant. U. S. v. Mathes (D. C. Fla. 1924) 1 F.(2d) 935. The court said: "In these causes it is sought to have the cases certified by the United States commissioner to the district judge, to have his ruling upon the motions to quash the search warrants reviewed and revised by this court. While Judge Hand, in U. S. v. Casino (D. C. N. Y. 1923) 286 F. 976, holds that the district judge has power to do this, apparently, I am not satisfied to follow that decision. Circuit Judge Hough, sitting in the District Court in the case of U. S. v. Maresca et al. (D. C. N. Y. 1920) 266 F. 713, had the question of procedure before him, and reached a conclusion contrary to that reached by Judge Hand, and I am more impressed by Judge Hough's discussion of the question.

"The motions for an order requiring the commissioner to certify his action on the motion to quash will therefore be denied in each of these cases. It seems to me that the procedure in matters where the defendant desires the court to decide whether seized property should be returned, or the evidence obtained by unlawful searches or seizures should be suppressed, is pointed out by the decisions of the Supreme Court.

"Section 17, title 11 (40 U. S. Stat., p. 230), of the Espionage Act [section 627 of Title 18, Criminal Code and Criminal Procedure], which is looked to by the defendants to support their contention, has no application to the question raised on this motion."

"Where a search warrant is supported by an affidavit showing probable cause, the burden is upon the moving party, who seeks to quash the warrant or the evidence obtained under it, to show that his building was not used for the purposes charged by the officers." U. S. v. Goodwin (D. C. Cal. 1924) 1 F.(2d) 36.

After a commissioner has issued a search warrant, it has been executed, and an information charging violation of the National Prohibition Act (incorporated in this title), based on the evidence obtained thereunder, has been filed in the District Court, the commissioner is without power to quash the warrant on a traverse, then made for the first time, of the grounds on which it was issued. U. S. v. McKay (D. C. Nev. 1924) 2 F.(2d) 257.

Action of United States Commissioner in vacating search warrant, under sections 625 and 626 of Title 18, Criminal Code and Criminal Procedure, after liquor and records had been seized by officers executing warrant for use as evidence, held reviewable by District Court, since such court, under this section, had the right to dispose of the property. In re No. 191 Front St., Borough of Manhattan, City of New York (C. C. A. N. Y. 1924) 5 F.(2d) 282.

That place to be searched is apartment house is not ground for vacating warrant. U. S. v. Yablonsky (D. C. N. Y. 1925) 8 F.(2d) 318.

The objection that no receipt was given for the property seized on search warrant, or no proper return was made by the officer, are simply omissions by the officer making the seizure to do ministerial acts, which may be corrected at any time, and are not grounds for quashing the writ. U. S. v. Giovanette (1921) 6 Alaska, 454.

90. Execution of warrant—In general.—Where a search warrant is issued against certain premises, the occupant thereof cannot avoid the effects of the warrant by absenting himself from the premises. U. S. v. Camarota (D. C. Cal. 1922) 278 F. 388.

A statement by defendant, when a government officer showed him a liquor search warrant, to "go ahead" with the search, did not waive defendant's constitutional rights, if the search warrant was unlawfully issued, since it is not to be construed as an invitation to search the premises, but rather as a statement of the intention not to resist search under the warrant. Salata v. U. S. (C. C. A. Ohio, 1923) 286 F. 125.

Failure of officer taking liquor under a search warrant to give a copy of the warrant, together with a receipt to the person from whom the property is taken or in the place where the property is found, as required by section 622 of Title 18, Criminal Code and Criminal Procedure, does not invalidate the warrant, or the search and seizure. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

In Murby v. U. S. (C. C. A. R. I. 1923) 293 F. 849, the court said:

"In this case the United States attorney endeavors to avoid the difficulties arising out of the proceedings under the search warrant, by contending that the outlawed property might reasonably have been seized without a search warrant. We have no occasion to consider the rather fine distinctions made in some of the cases on this point; for in this case the proceedings were strictly under and by virtue of the search warrant. What would have happened or have been found if the officers had proceeded without process is a matter of pure conjecture, in which we need not indulge. Kathriner v. U. S. (C. C. A. Cal. 1921) 276 F. 808; O'Connor v. U. S. (D. C. N. J. 1922) 281 F. 396; Vachina v. U. S. (C. C. A. Nev. 1922) 283 F. 35; U. S. v. McBride (D. C. Ala. 1922) 287 F. 214; U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963; State v. Liquors (1894) 68 N. H. 47, 48, 49, 40 A. 398; Reed v. Adams (1861) 2 Allen (Mass.) 413."

A search warrant must describe the premises to be searched and the property to be searched for and seized, which must be brought before the officer issuing the warrant, and confers no authority on the person to whom it is issued to seize and inventory property and leave it impounded on the premises of the owner in charge of a custodian. U. S. v. American Brewing Co. (D. C. Pa. 1924) 296 F. 772.

While prohibition agents were searching a public place under a search warrant, defendant entered through a rear door carrying a package, and when signaled by the proprietor started out through the front door. The package was wrapped in thin paper, and showed the outlines of two whisky bottles. He refused to stop on demand of one of the agents, but was followed and arrested outside, and the package seized and found to contain whisky. It was held that the arrest and seizure were justified and lawful and that the evidence seized was admissible against him. Garske v. U. S. (C. C. A. Minn. 1924) 1 F.(2d) 620.

Illegal acts of officers held not to render unlawful search under valid warrant. Giacolone v. U. S. (C. C. A. Wash. 1926) 13 F.(2d) 108.

91. —— Persons making search.—The execution of a search warrant by a person not named therein nor shown to have been acting for a person so named and in his presence is unlawful. U. S. v. Dziadus (D. C. W. Va. 1923) 289 F. 837.

The mere presence of a prohibition agent at a search made by the police under a search warrant procured by them did not make the search one under federal authority, to which the Fourth Amendment applies. Gatterdam v. U. S. (C. C. A. Ky. 1925) 5 F.(2d) 673.

Searches and seizures under search warrants issued pursuant to this section, held unlawful, where the warrants were not executed by the officer to whom directed, nor in his presence by one aiding him, as required by section 617 of Title 18, Criminal Code and Criminal Procedure. Leonard v. U. S. (C. C. A. Mass. 1925) 6 F.(2d) 353.

Where search warrant under this section was not only addressed to named prohibition agent, and his deputies, but also to Commissioner of Internal Revenue, his assistants, agents, and inspectors, it could be served by prohibition agent as Commissioner's "assistant" or "agent," though named agent had no deputies. U. S. v. Kasprowitz (D. C. Mich. 1926) 14 F.(2d) 193.

92. —— Time of search.—A search at night has been held to be in disregard of the law where the warrant contained no

direction that it might be served at any time of the day or night. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963; U. S. v. Rykowski (D. C. Ohio, 1920) 267 F. 866.

Under Const. Amend. 4, section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, and this section, if a search for liquor is made in the nighttime, authorized by a search warrant not supported by an affidavit stating positively that the property was on the person or in the place to be searched, the search would be illegal. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

A search at 5:15 p. m. on December 22 is not authorized by a search warrant for search "in daytime only." U. S. v. Syrek (D. C. Mass. 1923) 290 F. 820.

Execution of a search warrant to search premises for intoxicating liquor within 10 days after issuance was held legal. Murby v. U. S. (C. C. A. R. I. 1924) 2 F.(2d) 56.

93. —— Places which may be searched.—Where neither affidavit nor warrant disclosed that the building to be searched was a dwelling, but authorized only the search of a shoe shop, it was improper to search a part of the premises not used as a shoe shop, but as a dwelling. Pressley v. U. S. (C. C. A. Fla. 1923) 289 F. 477.

Where a search warrant directed a search of a building designated by the street number, which was occupied as a saloon, with living rooms of the proprietor above, a search of the room was not unlawful because the stairway entrance bore a different number. U. S. v. McGuire (D. C. N. Y. 1924) 300 F. 98, wherein the court said: "The defendant further contends that the premises searched were not the premises described in the search warrant, but were rather other premises, because the number 720 was over the street entrance to the hall leading to the second floor, where the rooms searched were. In the search warrant the premises were designated as 718 Albany street, and further specifications given covering the entire premises on both floors, except possibly the lower hall. There could be no mistake in identity of place. There could be no rooms over the saloon 718 Albany street, other than those described and searched.

"There is no statutory requirement that a street number of a place shall be given. All that is necessary is such description as identifies the premises to be searched. Had the search warrant directed the search of the premises on the southwest corner of Albany street and Summit avenue, consisting of saloon, rooms in the rear, and the rooms overhead, it would have been a valid and unmistakable description, without the use of any street numbers. Even had the description read 'saloon corner of Albany street and Summit avenue, consisting,' etc., without any street number, it would have been sufficient, as there is but one saloon on the corner of Albany street and Summit avenue. Had there been no street number 720 over the door leading from the street into the hall of the premises in question, no question would have arisen, and the description given in the search warrant would have accurately and fully described the premises to be searched.

"The mere fact that the number 720 was over the hall door leading from the street to the hall changes nothing, and brings no doubt or uncertainty as to the premises described in the search warrant. Cases where the description is so vague and indefinite that the premises to be searched cannot be definitely located, or where there are two locations containing the same street number, or where there are other misdescriptions of the premises, have no application here. Here there can be no mistake as to the premises intended to be searched."

A search warrant for the search of a building "operated as a grocery store" gave no authority to search residential rooms above the store, nor was it justified by the fact that, after their unlawful invasion of such rooms, the officers detected the odor of mash, and their testimony based on what they there found was inadmissible over objection. Giusti v. U. S. (C. C. A. Tex. 1925) 4 F.(2d) 703.

In prosecution for possession of intoxicating liquors, error cannot be predicated on unlawful entry of house under search warrant authorizing search of garage only, where no liquor was found in house, nor any evidence therein obtained tending to connect defendants with offenses charged. Gay v. U. S. (C. C. A. Wash. 1925) 8 F.(2d) 219.

94. —— Property which may be seized under warrant.—Prohibition agents, holding a warrant to search for intoxicating liquors, were entitled to take a locked safe into their possession for a reasonable time until it could be opened, where defendant locked the safe and refused to open it. U. S. v. Metzger (D. C. N. Y. 1920) 270 F. 291.

Where a prohibition officer, acting under a warrant authorizing him to search premises for intoxicating liquor, discovers during the course of such search articles used in the manufacture of intoxicating liquor he may seize them so as to prevent the commission of a crime even though they are not specified in the search warrant. U. S. v. Camarota (D. C. Cal. 1922) 278 F. 388, wherein the court, in upholding the validity of such seizure, said:

"This question is governed by the principles announced in the following cases. Adams v. New York (N. Y. 1904) 192 U. S. 585, 595, 24 S. Ct. 372, 48 L. Ed. 575; Weeks v. U. S. (Mo. 1914) 232 U. S. 383, 398, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silver-

thorne Lumber Co. v. U. S. (N. Y. 1920) 251 U. S. 385, 391, 40 S. Ct. 182, 64 L. Ed. 319.

"Under the ruling in the case of Adams v. New York, supra, there is no question that the motion should be denied. The last two cases, however, are in conflict with the case of Adams v. New York in some particulars. I take it, however, that in neither of the last two cases does the court take the position that property obtained without the officer having committed a trespass should be destroyed or returned. The officer in the case before the court did not commit a trespass. The defendant Camarota certainly could not avoid the effect of a search warrant by absenting himself from the premises. It is not necessary that the search warrant name a particular person; the name of the place to be searched is sufficient. Act June 15, 1917, tit. 11, § 6 [section 616 of Title 18, Criminal Code and Criminal Procedure]; U. S. v. Borkowski (D. C. Ohio, 1920) 268 F. 408.

"The officer having entered upon the premises without having committed a trespass, and thus being lawfully there, and seeing a crime being committed, had a perfect right, and it was his plain duty, to seize the articles which were being used in committing the crime. In making such seizure, the officer could not do so by virtue of the search warrant, but in the performance of his general duty to prevent the commission of crime. U. S. v. Fenton (D. C. Mont. 1920) 268 F. 221; Ex parte Morrill (C. C. Or. 1888) 35 F. 261, 267; 20 Stat. at Large, 341, § 9 [section 593 of Title 18, Criminal Code and Criminal Procedure]; U. S. v. Welsh (D. C. N. Y. 1917) 247 F. 239."

And searching officer, after lawful entry has been held not limited by terms of warrant as related to liquors which he could lawfully seize. U. S. v. Old Dominion Warehouse (C. C. A. N. Y. 1926) 10 F.(2d) 736.

But the seizure of 7,000 gallons of spirits under a search warrant describing not to exceed 450 gallons has been held illegal, under Const. Amend. 4, and section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, requiring that property to be seized must be particularly described. Keefe v. Clark (D. C. Mass. 1923) 287 F. 372.

Under a search warrant for liquors, lawfully issued under this section, forged and fictitious permits found on the premises, and apparently used in unlawful sale of liquor, may properly be seized and used as evidence of such unlawful sales. Lipschutz v. Quigley (D. C. Pa. 1923) 287 F. 395.

"Beer and property used in the making of beer, while in the possession and on the property of a brewing company holding a brewery permit issued by the United States Treasury Department, cannot lawfully be seized under a search warrant issued on an affidavit charging that beer in excess of the authorized alcoholic content is being illegally taken away from said brewery. * * * In the instant case, the petitioner had the right under the terms of its permit and under the terms of section 37 of title 2 of the National Prohibition Act [sections 57 to 60 of this title] to develop by the usual methods of fermentation and manufacture a beer containing more than one-half of one per cent. of alcohol by volume under and subject to the provisions of the act requiring the reduction of the alcoholic volume to within the legal limit before the beer is withdrawn from the brewery, or at such bonded plant to which it might be removed, under the commissioner's regulations, for the purpose of having the alcoholic volume reduced. For any alleged failure on its part to conform in good faith to the provisions of the act, a clear remedy is provided consisting of a citation to appear before the commissioner, a hearing on the complaint, and a revocation of the permit. This remedy cannot be dispensed with by means of a warrant of search and seizure." Mellet, etc., Brewing Co. v. U. S. (D. C. Pa. 1923) 296 F. 765.

Warrant for search of premises issued on affidavit as to use of premises for possession and sale of liquor, without statement of facts as to use of records in connection with liquor did not warrant seizure of records pertaining to the sale, possession, or transportation of liquors on theory that records were means or an instrument of crime. In re No. 191 Front St., Borough of Manhattan, City of New York (C. C. A. N. Y. 1924) 5 F.(2d) 232.

Where warrant was valid in so far as it authorized search of premises for liquor, but was void in so far as it authorized seizure of records relating to possession and sale of liquor, the officers executing the warrant had no authority to seize the records, on theory that they were lawfully on the premises, nor on theory that owner at time of seizure was under arrest; the records being in the house and not on the owner's person. Id.

Where prohibition agents, acting under a search warrant directing search of a brewery for intoxicating liquors, containers, and property designed and intended for unlawful manufacture of liquor, seized the entire brewery and contents including fixtures, steam engines, and other machinery, as well as a quantity of beer in tanks, their action was held separable, and sustainable as to the beer. U. S. v. Nine 200-Barrel Tanks (Approximately Full) of Beer (D. C. R. I. 1925) 6 F.(2d) 401.

Warrant for search because of violation of National Prohibition Act (incorporated

in this title) a misdemeanor, primarily for liquor, not describing any papers, and no liquor being found, papers and document in a defendant's house and office, constituting mere evidence that a crime may have been committed, could not rightfully be seized on any theory. U. S. v. Olmstead (D. C. Wash. 1925) 7 F.(2d) 760.

Indiscriminate seizure of incriminatory documents was held not warranted, under search warrant authorized by this section, describing property seizable as liquor, containers thereof, and property designed for manufacture. U. S. v. Kirschenblatt (C. C. A. N. Y. 1926) 16 F.(2d) 202.

Seizure of entire brewery was held invalid, and evidence inadmissible, under warrant authorizing seizure of intoxicating liquors only, regardless of averments of affidavit. U. S. v. City Products Co. (D. C. N. J. 1926) 16 F.(2d) 317.

95. Return of warrant.—The failure to make a return of a search warrant is only an irregularity which may be corrected on motion. U. S. v. Kraus (D. C. N. Y. 1921) 270 F. 578.

"The failure of the officer to whom a search warrant is directed to make a return thereof cannot invalidate the search or seizure made by authority of such warrant. If the officer neglects to do this, he can be required to make return of the writ at any later time, or if the person whose premises were searched or whose property was seized is injured in any way by the failure to make this return, the officer failing to make such return is liable to him in damages. The making of the return is merely a ministerial act, to be performed after the warrant is executed." Rose v. U. S. (C. C. A. Ohio. 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed. 419.

Failure of officer seizing liquor under a search warrant to comply with section 623 of Title 18, Criminal Code and Criminal Procedure, providing that he forthwith return the warrant and deliver a written inventory, made public or in the presence of the person from whom possession was taken, etc., does not invalidate the search and seizure. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

It is not necessary for an officer who has executed a search warrant to state in his return that he delivered a copy of the warrant and a receipt for property seized thereunder to the person from whom it was taken; such fact may be shown by extrinsic testimony. Gandreau v. U. S. (C. C. A. R. I. 1924) 300 F. 21.

The return on a search warrant may be amended to conform to the facts, and the fact that the officer who executed a search warrant has ceased to be such officer does not prevent amendment of his return on his testimony. Id.

The fact that the return on a search warrant through clerical error stated the date as 1922 instead of 1923 is not ground for striking out evidence relating to the true date. U. S. v. Golden (D. C. Minn. 1923) 1 F.(2d) 543. See, also, Golden v. U. S. (C. C. A. 1925) 4 F.(2d) 846.

A direction in a search warrant to an officer to "do and report concerning the same as the law directs" was sufficient to require service of a copy of the warrant and receipt for property taken, as required by section 622 of Title 18, Criminal Code and Criminal Procedure, but the return should affirmatively "report" that the officer served a copy of the warrant and a receipt for property taken. Murby v. U. S. (C. C. A. R. I. 1923) 293 F. 849.

96. Proceedings subsequent to seizure.—Under this section, relative to searches and seizures, and section 50 of this title, placing the burden of proof on any possessor of liquor in any action concerning the same to prove that it was lawfully acquired, possessed, and used, an officer seizing liquors under a search warrant must cause appropriate proceedings to be brought to determine whether the liquor has been lawfully possessed, or is liquor as to which no property rights exist. U. S. v. Crossen (D. C. Pa. 1920) 264 F. 461.

"At common law a search and seizure under legal process is not a complete proceeding in itself. It is a first step either in criminal prosecution or in judicial proceedings for the forfeiture of what has been taken; it must be followed up by an appropriate action in court of one sort or the other. Six Carpenters' Case, 8 Co. 146; Kent v. Willey (Mass. 1858) 11 Gray, 368; Russell v. Hanscomb (Mass. 1860) 15 Gray, 166; Esty v. Wilmot (Mass. 1860) 15 Gray, 168, 169; Godat v. McCarthy (D. C. Mass. 1922) 283 F. 689. To hold that property may be seized and kept indefinitely by officers, without any sort of judicial proceedings, would open the door to great oppression and abuses. Under title 11 of the Espionage Act [section 611 of Title 18, Criminal Code and Criminal Procedure] a copy of the inventory of the property seized must, if demanded, be delivered to the person from whom the property was taken; if the grounds on which the warrant was issued be controverted, the judge or commissioner must take testimony in relation thereto; and if it appears that the property was not the same as that described in the warrant, or there was not probable cause for the issue of the warrant, the judge or commissioner must cause the property to be restored to the person from whom it was taken. If probable cause be found and the property was described in the warrant, it is to be retained. The complete papers in the proceedings on the warrant are to be filed with the clerk of the court having power to inquire into the matter. These sections

provide a simple and direct procedure to determine the legality of the warrant and the government's right to hold the seized property; but it does not seem to me that they abrogate the common law, or relieve the prosecuting officers of the government from the necessity of following up searches and seizures by appropriate criminal or condemnation proceedings. The statute apparently assumes that if, on the warrant proceedings, the seizure is found to be lawful and justified, criminal prosecution will be instituted, and if not, that the property will be promptly returned." Keefe v. Clark (D. C. Mass. 1923) 287 F. 872.

Liquor seized on a search warrant issued under this section is not required to be delivered to the clerk of the court, but may lawfully be retained by the officer seizing it, unless otherwise ordered by the court. U. S. v. McGuire (D. C. N. Y. 1924) 300 F. 98.

Notwithstanding sections 625 to 627 of Title 18, Criminal Code and Criminal Procedure, contain matter inconsistent with National Prohibition Act (incorporated in this title) which by this section declares that search warrant may issue as provided in those sections, which require commissioner, when grounds on which warrant was issued are controverted, to take testimony affecting question whether there was probable cause, and whether property seized described in warrant, such sections apply to proceedings under National Prohibition Act and entitle claimant of property seized to hearing before commissioner on such matter. U. S. v. Ephraim (D. C. R. I. 1925) 8 F.(2d) 512.

RETURN OF PROPERTY SEIZED

121. In general.—Where a warrant is based on information obtained at the time of making an unlawful search, papers seized under the warrant cannot be retained. U. S. v. Kraus (D. C. N. Y. 1921) 270 F. 578.

Liquor unlawfully seized in a private dwelling without a search warrant will be ordered returned on motion. U. S. v. Kelih (D. C. Ill. 1921) 272 F. 484; Connelly v. U. S. (D. C. N. Y. 1921) 275 F. 509.

Where the original entry into the defendant's home was unlawful, the seizure of property at that time is therefore unlawful and cannot be cured by another warrant issued on information thereby secured, and property so taken will be ordered restored. U. S. v. Mitchell (D. C. Cal. 1921) 274 F. 128.

A drug store proprietor, from whom intoxicating liquor was taken under an illegal search warrant, was entitled to a return of the liquor so taken, on motion therefor, in a prosecution for having unlawful possession of liquor for beverage purposes, in violation of the National Prohibition Act (incorporated in this title). Giles v. U. S. (C. C. A. N. H. 1922) 284 F. 208.

Since section 50 of this title does not make possession of liquor in a private dwelling for personal consumption only unlawful, and thereby permits possession for some purposes, the provision of this section, requiring liquor unlawfully held or possessed to be destroyed unless the courts shall otherwise order, does not prevent the return of liquor unlawfully seized to the person from whom it was seized, and who claimed he had stored it for his own use. U. S. v. Mattingly (App. D. C. 1922) 285 F. 922.

Liquor illegally seized by prohibition agents from a private dwelling must be returned on application therefor. U. S. v. A Quantity of Intoxicating Liquors (D. C. Mass. 1923) 289 F. 278.

An owner of liquor seized by prohibition agents is entitled to its return where the proceeding for forfeiture was not instituted until twenty-one months after the seizure. U. S. v. A Quantity of Intoxicating Liquors (D. C. Mass. 1923) 289 F. 278.

"It is quite clear that, after property has been seized upon a search warrant, it may be retained for a reasonable time in order to permit the proper officials to institute prosecution or forfeiture proceedings. It is for those purposes and those only that the government has the right to hold it. If, as here, no criminal proceedings are instituted, then after the expiration of a reasonable time for forfeiture proceedings the government has no further right to keep the property. Such proceedings ought to be promptly instituted. Under ordinary circumstances 11 months is certainly more than a reasonable time. In this case during most of that interval the petition brought by Keefe was pending. The government was resisting his claim and was in effect asserting a right to forfeit the liquors. But, even if it had prevailed, there was still no proceeding pending against Keefe or the liquors in which a decree of forfeiture could be entered, nor any proceeding in connection with which, and as part of which, there was a right to retain the liquor. The duty and the necessity of following up the seizure by appropriate judicial proceedings were not abrogated by Keefe's action. Notwithstanding the pendency of Keefe's petition, therefore, the government's possession of the property after a reasonable time had elapsed was unjustifiable. It does not seem to me that the subsequent institution of forfeiture proceedings operated retroactively, and legalized what had theretofore become an illegal holding. The rights under the seizure had lapsed before the forfeiture petition was brought, and were

not revived by it." Keefe v. Clark (D. C. Mass. 1923) 287 F. 372.

Liquor seized in a search of rooms in a hotel used exclusively as a residence, under a warrant authorizing merely the search of a hotel, must be returned on the showing of the illegal search and seizure. U. S. v. Sievers (D. C. Mass. 1923) 292 F. 394.

In a prosecution for unlawfully transporting intoxicating liquor, seized without a warrant, accused's motion for the return of the liquor and for its exclusion from evidence was properly denied, where there was no evidence that the liquor was in the possession of federal officers or of any officer of the court. Park v. U. S. (C. C. A. N. H. 1924) 294 F. 776.

Liquor seized under search warrant issued without probable cause must be returned to owner. U. S. v. Madden (D. C. Mass. 1924) 297 F. 679.

As liquor illegally seized from a vessel at sea cannot be used as evidence that it was being illegally transported in the United States, where without such evidence it cannot be established that the liquor is contrabrand, it will be ordered returned. U. S. v. Burns (D. C. Fla. 1925) 4 F.(2d) 131.

Where record did not disclose persons from whom intoxicating liquor was taken under warrant improperly issued, nor persons in possession of premises when liquor was seized, but contained mere allegations that certain parties "owned" premises, without showing that they owned liquor, or even that they were in possession of premises, liquor will not be ordered returned under this section, and section 626 of Title 18, Criminal Code and Criminal Procedure. In re Hollywood Cabaret (C. C. A. N. Y. 1925) 5 F.(2d) 651.

Where liquor was seized without a warrant, and a conviction of the owner for unlawful possession was reversed by the appellate court on the ground that there was then no statute making his possession unlawful, he is entitled to return of the liquor on proper application to the court. In re Brenner (C. C. A. N. Y. 1925) 6 F.(2d) 425.

The right of the owner of liquor unlawfully seized from his possession for alleged violation of a prohibition statute to its return after his acquital cannot be defeated by the assertion of its liability to seizure under the internal revenue laws; no such claim having been made during the more than five years it was in custody. Id.

Property taken on invalid search warrant and held under forfeiture proceedings should not be ordered returned, unless libel is dismissed, although search warrant was quashed. U. S. v. 63,250 Gallons of Beer (D. C. Mass. 1926) 13 F.(2d) 242.

Intoxicating liquors seized in dwelling house under warrant afterwards quashed should be returned, without further proof by claimants. Dickhart v. U. S. (1926) 16 F.(2d) 345, — App. D. C. —.

Power of court under this section, to make disposition of "such property so seized," means seized under a search warrant. U. S. ex rel. Frank v. Mathues (D. C. Pa. 1927) 17 F.(2d) 274.

The defendant was the keeper of a public restaurant which occupied the ground floor of the building while he had his residence on the second floor. The United States marshal searched the restaurant premises, having a search warrant for that purpose, and therein found two bottles thought to contain intoxicating beverage. Defendant filed a motion, based on his affidavit, for the return of the two bottles and contents, alleging that the bottles contained only "near" beer, with alcoholic content of less than one-half of 1 per cent. Held, the theory upon which property is redelivered to the defendant upon motion of this kind and the evidence thus suppressed, is that the use of the property by the government in the prosecution would be prejudicial to the defendant, and be productive of incriminating evidence against him, but, according to the defendant's own statement, the evidence of these two bottles and contents would in no way be prejudicial to him, and the motion is denied. U. S. v. Ketoorky (1922) 6 Alaska, 762.

See In re Search of No. 15 East Third St. (D. C. N. Y. 1922) 284 F. 914, as to effect of section 626 of Title 18, Criminal Code and Criminal Procedure.

Drug store owner has been held entitled to return of property taken from him in illegal search by government officials without warrant, in absence of other evidence that property was contraband or unlawfully possessed. Brock v. U. S. (C. C. A. Mo. 1926) 12 F.(2d) 370.

In prosecution for unlawful possession of intoxicating liquor, accused's motions for return of liquor seized in search of her premises were properly denied, where search and seizure was made by state officers, without participation of federal officers or under federal process or authority. Vollmer v. U. S. (C. C. A. Tex. 1924) 2 F.(2d) 551.

Whether action of prohibition administrator in returning liquors while court proceeding for their return is pending, is contempt of court—quaere. In re Troy Pure Food Products Co. (D. C. N. Y. 1926) 14 F.(2d) 677.

122. **Property possessed or used in violation of law.**—In the case of the unlawful seizure of liquors, themselves unlawfully possessed, if any one is entitled to their summary return, under either this section or section 626 of Title 18, Criminal Code and Criminal Procedure, it is only the person whose possession has been dis-

turbed. Gallagher v. U. S. (C. C. A. N. Y. 1925) 6 F.(2d) 758.

Where liquors and stills being used by defendants in violation of the law were seized by officers acting under invalid search warrants, it was held that the property would not be returned to defendants, though the evidence obtained by the search could not be used against them, because of the illegal methods by which it was procured. U. S. v. Rykowski (D. C. Ohio, 1920) 267 F. 866.

Though intoxicating liquor is illegally seized in the residence of a claimant by prohibition officers acting without a search warrant, the liquor will not be returned to the claimant where it appears that he does not claim to own it and that his possession of it was unlawful under the National Prohibition Act (incorporated in this title). O'Connor v. Potter (D. C. Mass. 1921) 276 F. 32.

Intoxicating liquor seized under an illegal search warrant, will be ordered to be destroyed rather than returned, where it appears that the liquor is illicit, having been manufactured contrary to law. U. S. v. Alexander (D. C. Fla.) 278 F. 308.

"Section 25, title II, National Prohibition Act [this section] declares that no property rights shall exist in any liquor, or property designed for the manufacture of liquor, intended for use in violating this title or which has been so used. Therefore the petitioner is not entitled to have returned to him anything seized coming under this definition of contraband property." U. S. v. Dziadus (D. C. W. Va. 1923) 289 F. 837.

And druggist holding a permit under the National Prohibition Act (incorporated in this title) has been held not entitled to return of liquor seized without a warrant where evidence showed that liquor was kept for unlawful sale. Cabitt v. Potter (D. C. Mass. 1923) 293 F. 54.

Liquor seized under a defective search warrant will not be ordered returned, in the absence of a showing that defendant's possession thereof was lawful. Voorhies v. U. S. (C. C. A. La. 1924) 299 F. 275.

The power of the court cannot be used to restore possession of liquor illegally seized by government officers, where its possession is violation of law, since the court will not assist in doing an unlawful act. U. S. v. Goodwin (D. C. Cal. 1924) 1 F.(2d) 36.

Illicitly manufactured liquor and instrumentalities used in the manufacture are forfeited to and the property of the United States, and will not be restored to persons from whom seized, even if the seizure was unlawful. U. S. v. Apple (D. C. Mont. 1924) 1 F.(2d) 493.

And under this section, providing that no property rights shall exist in liquor or property designed for manufacture of liquor intended for use in violation of the act, it was held that such property, though seized under an invalid search warrant, will not be returned to the owner. U. S. v. Gaitan (D. C. Cal. 1925) 4 F.(2d) 848.

And claimant of liquor testifying to unlawful possession has been held not entitled to its return. U. S. v. 185 Cases Scotch Whisky (D. C. R. I. 1926) 15 F. (2d) 563.

A person required to deliver to an officer keys which were surreptitiously and unlawfully made at his request for the purpose of enabling him to occupy premises, to which he had no right, for the storage of liquor, is not entitled to have them back. Chico v. U. S. (C. C. A. S. C. 1922) 284 F. 434.

But under Const. Amends. 4, 5, it was held that property used in the manufacture of intoxicating liquor and seized upon an unlawful search of a private dwelling will be ordered returned, though this section provides that there shall be no property rights in illicit liquors or apparatus for their manufacture, since to permit the government to retain possession of such property and use it on the trial would be, in effect, to require defendant to be a witness against himself, contrary to Amendment 5. U. S. v. Kelih (D. C. Ill. 1921) 272 F. 484.

And in another case it was held that despite section 50 of this title, intoxicating liquors seized in near-beer saloon under an illegal search warrant will be returned to proprietor, though criminal proceedings against him have been terminated, where the only evidence that the liquor was contraband when seized, and will be, if returned, unlawfully possessed, under this section and section 12 of this title, is that illegally obtained in violation of Const. Amend. 4. Geraghty v. Potter (D. C. Mass. 1925) 5 F.(2d) 366, directions to vacate judgment remanded Potter v. Geraghty (1926) 47 S. Ct. 235, 71 L. Ed. —.

123. Proceedings to obtain return—In general.—The court will not assume that a search warrant is void where the petition for the return of papers seized contains loose allegations of its insufficiency and neither the warrant nor its supporting papers are presented. U. S. v. Kraus (D. C. N. Y. 1921) 270 F. 578.

A federal district court has jurisdiction of a petition for the return of liquor claimed to have been seized in a private dwelling by virtue of a search warrant that was invalid, where the warrant was filed in the office of the clerk of that court as required by law, which also required that the property seized should be subject to the disposition of the court. U. S. v. Descy (D. C. R. I. 1922) 284 F. 724.

The refusal of the court to hear a petition for the return of liquors seized until the facts had been developed in the pending prosecution for a violation of the National Prohibition Act (incorporated in this title) is not error. Panaich

v. U. S. (C. C. A. Cal. 1923) 285 F. 871, certiorari denied (1923) 43 S. Ct. 524, 262 U. S. 749, 67 L. Ed. 1213.

Unless the petition for return of liquor unlawfully seized under Const. Amend. 4, section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, and this section, affirmatively shows that the petitioner is legally permitted to have possession of the liquor, the effort is to recover the possession of physical property whose possession will be a crime, and the petition will be denied. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

A thousand bottles of beer, a capping machine, some corks, and a pint bottle of "white-mule" whisky were seized in defendant's restaurant on July 3, by the United States marshal, and on July 10, upon notice to defendant, and hearing, the court made an order that this property be destroyed. On October 28, thereafter, the defendant filed an affidavit and motion for a return of the property to him, showing that the building in which it was seized was his private dwelling house, and because the property was seized in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States. Held, that property will be returned in such cases only where seasonable application is made; that no application was made in this case within a reasonable time, and the motion is denied for that reason. U. S. v. Ketoorky (1922) 6 Alaska, 762.

Petition for return of liquor by defendant indicted for conspiracy to transport intoxicating beverages granted in absence of evidence that it was contraband. U. S. v. Burns (D. C. Fla. 1925) 4 F.(2d) 131.

As to evidence of claimant's ownership of liquors illegally seized, see Carozza v. U. S. (C. C. A. Md. 1922) 284 F. 842.

124. —— Nature and form of remedy.—Under this section the court may entertain an original suit by a claimant for return of the property. Petition of Barber (D. C. Mich. 1922) 281 F. 550.

The owner of liquor unlawfully seized by officers under a search warrant has, without statute, no summary remedy for a return of his property. U. S. v. Casino (D. C. N. Y. 1923) 286 F. 976.

The only summary remedy anywhere suggested to obtain the return of liquors unlawfully seized under search warrant is under this section and section 626 of Title 18, Criminal Code and Criminal Procedure, and owner of liquor seized must bring himself within one of these, or he must sue the officers for their trespass. Id.

A summary proceeding for return of liquor unlawfully seized is purely possessory, and its sole purpose is to restore the status quo. Gallagher v. U. S. (C. C. A. N. Y. 1925) 6 F.(2d) 758.

Claimant of property, seized for violation of National Prohibition Act (incorporated in this title), may, after unreasonable delay in bringing forfeiture proceeding, bring action for abandonment of seizure or return of property. Church v. Goodnough (D. C. R. I. 1926) 14 F.(2d) 432.

Where property has been unlawfully seized, without a search warrant, for violation of the National Prohibition Act (incorporated in this title) and no criminal action is brought, the appropriate remedy of claimant is not a motion in court for return of the property but by petition for mandamus to compel institution of libel proceedings, in which his rights may be determined. In re Troy Pure Food Products Co. (D. C. N. Y. 1926) 14 F.(2d) 677.

Under this section and pertinent provisions of the Espionage Act (section 611 et seq. of Title 18, Criminal Code and Criminal Procedure), in cases where no action has been taken by libel or attachment or otherwise after seizure under search warrant, party averring injury may proceed by way of petition that warrant be quashed and property returned. Levin v. Blair (D. C. Pa. 1927) 17 F.(2d) 151.

125. —— Power of commissioner.—A United States commissioner, who has issued a search warrant under this section, is without power to order a return of liquor seized thereunder, which is "subject to such disposition as the court may make thereof." Francis Drug Co. v. Potter (D. C. Mass. 1921) 275 F. 615; Diligannis v. Mitchell (D. C. Cal. 1922) 279 F. 131. Such relief can only be obtained from the court. Diligannis v. Mitchell (D. C. Cal. 1922) 279 F. 131.

The provision in section 11 of this title which authorizes United States commissioners to issue search warrants under the limitations provided in section 611 et seq. of Title 18, Criminal Code and Criminal Procedure, does not authorize the commissioner to return property wrongfully seized thereunder, as provided in section 626 of Title 18, such provision being superseded as to such seizures by the provision in this section that property seized thereunder "shall be subject to such disposition as the court may make thereof." In re Alpern (D. C. N. Y. 1922) 280 F. 432.

Commissioner, on finding that search warrant under which liquor was seized was improvidently issued, has no authority to order return of liquor, but should order it held to be otherwise disposed of according to law. U. S. v. Ephraim (D. C. R. I. 1925) 8 F.(2d) 512.

126. —— Review.—Where a warrant of search and seizure was quashed, and the property consisting of the entire plant of the movant was ordered returned, and the government desired to appeal, an order in

effect a supersedeas postponing the carrying out of the order was refused, but the owner was required to file a bond conditioned upon the return to custody of the marshal of any property enumerated in a libel by the government in a separate proceeding praying for condemnation and forfeiture of some of the property enumerated in the inventory returned on the search warrant, under the National Prohibition Act (incorporated in this title). Mellet, etc., Brewing Co., Inc., v. U. S. (D. C. Pa. 1923) 290 F. 765.

In prosecution for violation of National Prohibition Act (incorporated in this title) order denying return of liquor seized after quashing of search warrant and discharge of defendants is final order for purpose of review. Dickhart v. U. S. (1926) 16 F.(2d) 345, — App. D. C. —.

EVIDENCE

131. Suppression of evidence.—The acts of federal prohibition agents in summarily destroying intoxicating liquor found while searching premises under a valid search warrant constitute a trespass, and under the doctrine of trespass ab initio the evidence secured during such a search will be suppressed. U. S. v. Cooper (D. C. Mass. 1924) 295 F. 709.

Evidence, beer and wine, obtained from defendant's private dwelling by means of a search warrant, issued on an affidavit which did not show, as required by this section, that the dwelling was being used for the unlawful sale of liquor, will be suppressed. U. S. v. Deloic (D. C. Wash. 1924) 2 F.(2d) 377.

In prosecution for maintaining liquor nuisance, refusal of motion, upon calling case and before jury was impaneled, to suppress and exclude whisky secured as result of alleged unreasonable search and seizure, was held not prejudicial, where evidence was not offered during trial. Brown v. U. S. (C. C. A. 8. C. 1925) 6 F.(2d) 522.

In a liquor prosecution, questions sought to be presented by assignment alleging error in denial of motion to suppress evidence, the motion being based on copies of papers and documents set forth in the assignment, were held not entitled to consideration, where bill of exceptions contained neither a motion to suppress, nor affidavit on which a search warrant was issued, nor a search warrant, and failed to show a motion for directed verdict at close of evidence. Walker v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 309.

Denial of motion to suppress evidence is res judicata in subsequent trial before jury. Horowitz v. U. S. (C. C. A. R. I. 1926) 10 F.(2d) 286.

On motion to suppress evidence, burden of proof was on defendants. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, affirmed (1927) 47 S. Ct. 531, 71 L. Ed. —.

Defendants held not to have sustained burden of proof on issue of suppression of evidence of liquors seized. Id.

132. Admissibility in general.—Liquor found in an automobile which was searched without a search warrant may be used in evidence against the owner where he gave permission to the officers to search it. Maldonado v. U. S. (C. C. A. Tex. 1922) 284 F. 853.

In the event of a citizen being arrested for being drunk or disorderly, or for some other crime, if after his arrest he is searched without warrant and liquor is found on him, the search and seizure is lawful, and the liquor can be retained, and can be used against the accused under a charge of violating the National Prohibition Act (incorporated in this title) under section 611 et seq. of Title 18, Criminal Code and Criminal Procedure. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

Liquors lawfully obtained under a valid search warrant may be used as evidence in a prosecution for an offense different from that charged against the defendant in the affidavit on which the search warrant was issued. Bookbinder v. U. S. (C. C. A. Pa. 1923) 287 F. 790, certiorari denied (1923) 43 S. Ct. 523, 262 U. S. 748, 67 L. Ed. 1213.

Where officers armed with a search warrant went on defendant's premises and hid themselves during the nighttime, while defendant was absent, testimony as to what they saw and heard on his return, and as to exchange of shots between defendant and such officers on defendant's discovery of their presence, has been held admissible, though the warrant had not been served. The court said: "It is contended that the plaintiff in error was entitled to the exclusion of all evidence of what the officers saw and heard upon his premises on the night of December 19, for the reason that their entry thereon was clandestine and unlawful; no service having been made of the search warrant. It is true that the officers went upon the premises at night and in a secret manner, and awaited the appearance of the plaintiff in error; they having caused to be sent him what purported to be a friendly warning to the effect that officers would be there in the morning, and the advice that he 'dump that stuff in the willows.' The appearance of the plaintiff in error and his codefendant, Brite, upon the scene, was evidence to the officers that they had come in response to the warning, and that the illicit still in the dugout belonged to them. The officers heard Brite tell the plaintiff in error to stay and watch the place and 'kill the first son of a bitch that shows up.' They heard one of them remark 'that it smelled pretty strong down there,' referring to the dugout, and heard the other answer that he would go down and open it and let the air out. The officers had noticed the

strong odor of fermentation, and after the dugout had been opened by Brite they saw the contents of it. When they told the plaintiff in error he was under arrest, he began firing, and thereupon several shots were exchanged, and one of the officers was mortally wounded. "The foregoing is the substance of the testimony as to what occurred on December 19. There was clearly no error in its admission. The officers were armed with a search warrant,but there was no occasion to use it. They did not need to serve it in order to go upon the land of the plaintiff in error. They had no occasion to open the door of the dugout. It was opened by Brite. They had ample evidence of their senses that a crime was then and there being committed." Raine v. U. S. (C. C. A. Nev. 1924) 299 F. 407, certiorari denied (1924) 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

That officer executing search warrant and seizing liquor erroneously stated date of seizure in written affidavit and return did not render such liquor inadmissible in evidence. Golden v. U. S. (C. C. A. Minn. 1925) 4 F.(2d) 846.

If an officer is authorized under a valid search warrant to enter premises, and there obtains evidence lawfully admissible in court, it will not be excluded because the officer failed to deliver a copy of the warrant and receipt to the person in charge, or to make and return a proper inventory. U. S. v. Gaitan (D. C. Cal. 1925) 4 F.(2d) 848.

Counterfeit bond strip label stamps seized by federal agents without warrant following lawful arrest of defendant for unlawful sale of intoxicating liquors, in violation of section 12 of this title, could be used as evidence, notwithstanding Const. Amends. 4 and 5, in prosecution for having possession of such stamps in violation of section 417 of Title 26, Internal Revenue, since government was in possession rightfully. U. S. v. Seltzer (D. C. Mass. 1925) 5 F.(2d) 864.

Liquor discovered through search by military picket without warrant was held admissible. U. S. v. Crowley (D. C. Ga. 1922) 9 F.(2d) 927.

Evidence obtained by officers without warrant, more than quarter of a mile from defendant's place of residence on investigation after detecting odor of fermenting mash, was held admissible. Koth v. U. S. (C. C. A. Idaho, 1926) 16 F.(2d) 59.

That officers, making search of open field more than a quarter mile from defendant's residence, after detecting odor of fermenting mash and seeing drunken man come from such direction, may have been trespassers, does not exclude evidence. Id.

In trial of indictment for sale, manufacture and conspiracy to manufacture liquors it was proper to admit receipt of record of United States court showing certain beer admittedly taken from defendant's brewery, had been seized and ordered destroyed by federal judge. This evidence was received, in support of indictment charging conspiracy, to prove motive, to show guilty knowledge and rebut any inference of mistake. Defense advanced having been that there was mistake in taking beer out of wrong vat, commonwealth could be permitted to prove defendants knew that they were manufacturing illegal beer, and that a car of beer containing an excess of alcohol had been seized by government and destroyed without their raising a hand to prevent such destruction. Commonwealth v. Grotefend (1925) 85 Pa. Super. Ct. 7.

133. Evidence as to warrant and proceedings thereunder.—In prosecution for transportation of liquor, where evidence fully established probable cause for seizure without warrant of liquor involved, fact that evidence adduced on defendants' motion made before trial for delivery to them of such liquor did not show probable cause for its seizure does not warrant reversal of conviction. Carroll v. U. S. (Mich. 1925) 45 S. Ct. 280, 267 U. S. 132, 69 L. Ed. 543, 39 A. L. R. 790.

On proof that a search warrant was issued for premises in question, but had been lost, testimony of a prohibition agent that he made the search under such warrant and found liquor on the premises and in possession of defendants is admissible in prosecution for maintaining a nuisance, and for unlawful possession and sale of liquor in violation of National Prohibition Act (incorporated in this title). Ryan v. U. S. (C. C. A. Ga. 1922) 285 F. 734.

A failure to comply with the provisions of the statute as to the delivery to the official who issued a search warrant of a sworn written inventory of property taken under it, does not render the warrant inadmissible in a prosecution for unlawfully possessing intoxicating liquor, since the making and delivery of the inventory was a ministerial act, the omission of which did not affect the validity of the search. Reisgo v. U. S. (C. C. A. Fla. 1923) 285 F. 740.

The fact that the return of a search warrant was not sworn to does not affect its competency as evidence against the person accused of unlawfully possessing intoxicating liquor. Id.

Where witnesses executing a search warrant made an inventory to be returned with the warrant, their testimony that they found liquor on the premises was admissible, notwithstanding the contention that the inventory was the best evidence. U. S. v. Maag (D. C. Pa. 1923) 287 F. 356.

Where evidence introduced without objection showed the issuance and service of a valid search warrant, evidence of the

alcoholic content of liquor seized thereunder was admissible. Pavik v. U. S. (C. C. A. Wis. 1924) 4 F.(2d) 250.

Where officers, executing search warrant and seizing liquor, failed to produce warrant on demand, and testified but vaguely as to its terms, defendants claiming it was in blank, warrant would be assumed insufficient, and seizure illegal. Hagan v. U. S. (C. C. A. Okl. 1925) 5 F. (2d) 965.

Refusal to require government to produce affidavit and search warrant on file in office of issuing justice was held not error. Marin v. U. S. (C. C. A. Mich. 1926) 10 F.(2d) 271.

134. Evidence wrongfully obtained.—"The proposition is not open to argument that evidence obtained by an unconstitutional use of search warrants is not admissible, and convictions of crime so obtained must be reversed." Garske v. U. S. (C. C. A. Minn. 1924) 1 F.(2d) 620; Burns v. U. S. (C. C. A. Fla. 1924) 296 F. 468; Temperani v. U. S. (C. C. A. Cal. 1924) 299 F. 365.

The ground upon which evidence obtained by unlawful search and seizure is excluded is that knowledge gained by government as result of its own wrongful acts ought not to be used against party wronged. U. S. v. Seltzer (D. C. Mass. 1925) 5 F.(2d) 364.

So liquor or property illegally seized may not be used as evidence against the owner indicted under prohibition acts. U. S. v. Burns (D. C. Fla. 1925) 4 F.(2d) 131; Giles v. U. S. (C. C. A. N. H. 1922) 284 F. 208.

A search warrant illegally issued affords no basis for the use of property seized thereunder as evidence against the accused. Jozwich v. U. S. (C. C. A. Ill. 1923) 288 F. 831.

So evidence obtained under search warrant, issued without probable cause, must be excluded. U. S. v. Madden (D. C. Mass. 1924) 297 F. 679.

And articles obtained in search under search warrant issuance of which was unjustified were not admissible. Siden v. U. S. (C. C. A. Minn. 1925) 9 F.(2d) 241, modified on rehearing (C. C. A. 1926) 14 F.(2d) 846.

Evidence unlawfully secured on a search warrant for intoxicating liquor is not admissible against a defendant from whom it was seized, nor is testimony as to facts learned and information obtained while conducting such unlawful search. U. S. v. Dziadus (D. C. W. Va. 1923) 289 F. 837.

The evidence obtained on an unwarranted search for intoxicating liquor cannot be used either to secure the owner's conviction or to forfeit his property, if petition for its return is presented to the court before trial. U. S. v. Slusser (D. C. Ohio, 1921) 270 F. 818.

To permit the government to use the evidence gained upon an unlawful search in the prosecution of a criminal case would be to compel defendant to give evidence against himself within the meaning of the Fifth Amendment to the Constitution. U. S. v. Kelih (D. C. Ill. 1921) 272 F. 484.

Property used in the manufacture of intoxicating liquor and seized upon an unlawful search of a private dwelling, cannot be used in a pending criminal case, though two deputy collectors of internal revenue were members of the searching party and observed odors incident to the distillation process, whether or not the situation would be different in a civil proceeding. Id.

The fact that prohibition agents had evidence of the sale of intoxicating liquors in a private dwelling did not legalize their search of the dwelling without first obtaining a search warrant as required by this section, and liquor unlawfully seized therein is not admissible in evidence in a prosecution against the owner. Connelly v. U. S. (D. C. N. Y. 1921) 275 F. 509.

Where intoxicating liquor is illegally seized in the residence of a claimant by prohibition officers acting without a search warrant, neither the liquor seized nor the knowledge obtained by the seizure can be used in evidence in a criminal prosecution against the claimant. O'Connor v. Potter (D. C. Mass. 1921) 276 F. 32.

In prosecution of drug store proprietor for having unlawful possession of intoxicating liquor for beverage purposes, in violation of the National Prohibition Act (incorporated in this title) liquor seized after search of the store under illegal search warrant was held not admissible. Giles v. U. S. (C. C. A. N. H. 1922) 284 F. 208.

Where federal prohibition agents entered the defendant's private dwelling at night and in his absence and without a search warrant, the admission of their testimony and the articles found and seized by them, over the timely objection and application for the return of such articles, was error. The fact that state police officers were already on the premises and had found certain other articles, on which the charges were in part based, would not, under the circumstances, be sufficient to uphold a verdict against the defendant. Legman v. U. S. (C. C. A. N. J. 1924) 295 F. 474. The court said:

"We are not disposed to speculate as to the proportionate effect upon the jury of the testimony of the policemen, on the one hand, and of the prohibition agent, on the other, as to the results of their separate or joint searches. The relative weight which the jury gave to the testimony of the policemen and agent is unknown. Whether the defendant would have been convicted on any count on the testimony of the policemen only is also unknown. It may be that, without the

corroboration and independent testimony of the prohibition agent, the defendant would not have been convicted, or, on the other hand, he might have been convicted on all counts on the testimony of the policemen alone. What the jury might have done without the testimony of the prohibition agent is mere speculation, in which we cannot indulge to the injury of the defendant. The fact is that, if the search was unreasonable within the meaning of the Fourth Amendment, the defendant had the right to demand that the prohibition agents remain absolutely silent as to what they found in their search. If knowledge of the facts had been gained from an independent source, not connected with governmental agencies, they might have been proved, like any other fact, but knowledge gained by the government's own wrongdoing, alone or in connection with other agencies, may not be used against defendants in federal courts. In other words, if the search made by the prohibition agents was unreasonable, the fact that state officials, whom the Fourth Amendment does not reach, made a search either alone or with them, does not make reasonable and legal an otherwise unreasonable and illegal search, and a verdict based in part upon the disclosures of the unreasonable search cannot stand."

Evidence obtained by means of illegal search warrant held inadmissible, in prosecution under Volstead Act (incorporated in this title), on seasonable objection thereto. Rupinski v. U. S. (C. C. A. Mich. 1925) 4 F.(2d) 17.

Liquor illegally seized from a vessel at sea cannot be used as evidence that it was being illegally transported in the United States. U. S. v. Burns (D. C. Fla. 1925) 4 F.(2d) 131.

In prosecution for violation of National Prohibition Act (incorporated in this title), where United States commissioner had seen defendant's private papers, illegally taken after their arrest, and knew their contents, his testimony concerning initials on receipt, based on information first secured from those papers, should have been excluded, under Const. Amend. 4, though by reason of such information he had obtained an admission of one defendant that the initials were his. Watson v. U. S. (C. C. A. N. J. 1925) 6 F.(2d) 870.

Warrant for search because of violation of National Prohibition Act (incorporated in this title), a misdemeanor, primarily for liquor, not describing any papers, and, no liquor being found, papers and document in a defendant's house and office, constituting mere evidence that a crime may have been committed, could not rightfully be seized on any theory, and being seized could not, under Const. Amend. 5, as to compelling accused to give testimony against himself, be used against such defendant on prosecution for conspiracy to violate such act. U. S. v. Olmstead (D. C. Wash. 1925) 7 F. (2d) 760.

Where search warrant recited that it was issued on prohibition agent's affidavit, and such affidavit did not sufficiently show probable cause, personal property procured thereunder was inadmissible, notwithstanding testimony that commissioner considered affidavits of others. Kohler v. U. S. (C. C. A. Cal. 1925) 9 F. (2d) 23.

Liquor disclosed by search incidental to unjustifiable arrest without warrant is inadmissible, in prosecution for unlawful transportation. Morgan v. State (1926) 151 N. E. 98, 197 Ind. 374.

But where prohibition agents, from facts within their knowledge, would have been authorized to enter premises and make an arrest therein without a warrant, evidence secured as an incident to such arrest will not be excluded because the search warrant under which they purported to act was invalid. U. S. v. Gaitan (D. C. Cal. 1925) 4 F.(2d) 848.

And the seizure of wine, mash, bottles, etc., under this section, and Rev. Code S. D. 1919, § 10244, relating to illegal possession of intoxicating liquor, and a city ordinance prohibiting manufacturing wine, violated no right of the defendant, in a prosecution for violating the ordinance, regardless of whether the search was rightful, and their admission in evidence was not contrary to Const. art. 6, § 9, providing that no person shall be compelled to give evidence against himself, and section 11, prohibiting unreasonable searches and seizures. City of Sioux Falls v. Walser (S. D. 1922) 187 N. W. 821, writ of error dismissed Walser v. City of Sioux Falls (1923) 44 S. Ct. 35, 263 U. S. 678, 68 L. Ed. 502.

135. —— **Destruction of liquor as affecting admissibility.**—It has been held that evidence secured during a search when prohibition officers summarily destroyed liquor found is inadmissible though the search was made under a valid search warrant, as the unlawful destruction of the liquor by the officers rendered the search and seizure illegal. U. S. v. Cooper (D. C. Mass. 1924) 295 F. 709.

The contrary view has been taken by a New York District Court, it being held that the wrongful destruction of a part of the liquor seized under a valid search warrant does not estop the government from using the evidence. In re Quirk (D. C. N. Y. 1924) 1 F.(2d) 484, wherein the court said:

"The principal point presented is whether the prohibition officers conducting the search exceeded their powers in summarily destroying part of the liquor seized in the dwelling house, consisting of a barrel of whisky, a barrel of wine, three gallons of gin, and a barrel of alcohol, during the execution of the search warrant,

and whether such acts by them constituted a trespass, requiring the suppression of the evidence. It will be assumed that the search warrant was valid, and that probable cause existed for its issuance by the United States commissioner.

"In U. S. v. Cooper (D. C. Mass. 1924) 295 F. 709, upon which defendant relies, it was clearly held that prohibition agents searching premises described in a search warrant had no right to destroy intoxicating liquor found which was fit for beverage purposes, and their misconduct in this particular rendered the search warrant illegal, and evidence secured by them could not be used at the trial against the accused. I am unable to agree with this holding. It is true that, where authority to enter upon the premises of another is given by law and is subsequently abused, the party becomes a trespasser ab initio. It is so held in the early case of Allen v. Crofoot (1830) 5 Wend. (N. Y.) 507, and numerous cases have since accepted this principle, but I am disinclined to rule that this doctrine, because of the alleged wrongful acts of the officers, requires that the evidence must be suppressed.

"The Circuit Court of Appeals for the First Circuit, in Hurley v. U. S. (C. C. A. Mass. 1924) 300 F. 75, had before it a similar question for decision. In that case it appeared that in addition to the property seized as shown by the return the prohibition agent executing the search warrant found a quantity of beer in process of fermentation which he immediately destroyed. The learned court said: 'The officers were justified in seizing the fermenting mass which they found in the boilers for its evidentiary value to sustain the charge of unlawful manufacture, but they had no right to destroy the same without an order of the court. This act, however, did not destroy the evidentiary value of the other property seized nor make the seizure of the same unlawful. At common law an unlawful distraint of certain articles of property does not make unlawful the distraint of other property seized at the same time. Dod v. Monger, 6 Mod. 215; Harvey v. Pocock, 11 M. & W. 740; 1 Smith's Lead. Cas. 137. Nor does a wrongful attachment of property render void the attachment of other property made at the same time.' And quoting from Wentworth v. Sawyer (1884) 76 Me. 434: 'Where the act done is wrongful, but is so merely as to a part of the goods, no wrong being done as to the residue, the wrongdoer is a trespasser as to that part of the goods only in respect of which the wrongful act was done.'

"In such a situation the officers misconducting themselves during a search render themselves liable to an action and indictment, without the fact, however, that intoxicating liquors found during the search are incompetent as evidence. Indeed, by the Espionage Act (title 11, § 21 [section 631 of Title 18, Criminal Code and Criminal Procedure]), it is provided that an officer executing a search warrant, who willfully exceeds his authority, or exercises it with unnecessary severity, is liable to a fine of not more than $1,000 or imprisonment of not more than a year.

"In the recent case of U. S. v. Clark (D. C. Ala. 1924) 298 F. 533, there was also strong disagreement by the court with the rule of the Cooper Case, supra. The court substantially said that the officer had no power to pass judgment on the liquors to destroy them, since such power resided in the court alone, but failure of the officer in this respect to obtain an order of condemnation did not nullify all his acts under the warrant. If the search and seizure, the court said, had in fact been illegal, then under the reasoning of the Supreme Court the articles seized and the discovery of evidence during the illegal search could not be used; but since the search warrant was held to be valid, and the search and seizure was in compliance therewith, the wrongful act of the officer in destroying a part of the liquor does not estop the government from using the evidence. The reasoning of the decisions in the Hurley and Clark cases, supra, is believed sound, and will be followed by me."

136. —— **Prejudice from admission.**— Where defendant's guilt of manufacturing intoxicating liquors was made perfectly evident by competent and undisputed testimony to which there was no objection, it was held that he was not prejudiced by erroneous admission of evidence seized under an invalid search warrant. Malacrauis v. U. S. (C. C. A. W. Va. 1924) 299 F. 253.

One who takes the stand and admits every material fact testified to by raiding officers is in no position to claim that incompetent testimony obtained on illegal search was admitted. Libera v. U. S. (C. C. A. Cal. 1924) 299 F. 300.

In liquor prosecution, the admission of evidence obtained by means of a search of defendant's garage without a warrant, in violation of Const. Amend. 4, has been held harmless, in view of defendant's testimony, in which he admitted facts which such evidence tended to prove. Temperani v. U. S. (C. C. A. Cal. 1924) 299 F. 305.

The admission of evidence obtained by means of an illegal search warrant has been held harmless, in view of evidence overwhelmingly proving defendant guilty. Raine v. U. S. (C. C. A. Nev. 1924) 299 F. 407, certiorari denied (1924) 45 S. Ct. 94, 266 U. S. 611, 69 L. Ed. 467.

Where objections to search warrant and evidence obtained were erroneously overruled, conviction under National Prohibition Act (incorporated in this title), for sale to prohibition agents some time prior to search, was reversed where it was doubtful if jury would have convicted with-

out the illegal evidence. Perry v. U. S. (C. C. A. Cal. 1926) 14 F.(2d) 88.

In prosecution of hotel proprietors, for possession of intoxicating liquor, admission of evidence obtained by means of illegal search warrant held ground for reversal, notwithstanding other testimony of prohibition agent that he went into hotel room, found two glasses of beer and empty beer bottle on table therein, and saw two men in the room, in absence of evidence that defendants were present in the room, or had sold or served the beer. Lochnane v. U. S. (C. C. A. Wash. 1924) 2 F.(2d) 427.

137. —— **Admissibility against others than person wronged.**—In a prosecution for violating the National Prohibition Act (incorporated in this title) that evidence was obtained as a result of violating the right of privacy of one defendant, accorded by Const. Amend. 4, through a search and seizure without legal warrant, did not render it inadmissible against a codefendant. Schwartz v. U. S. (C. C. A. Tex. 1923) 294 F. 528.

It is not a valid objection to the admission of evidence against a defendant that it was secured through unlawful search of the premises of a codefendant. U. S. v. Williams (D. C. Mont. 1924) 295 F. 219.

That evidence was unlawfully secured from a third person, not under indictment, does not affect its admissibility. Canada v. U. S. (C. C. A. Tex. 1925) 5 F.(2d) 488.

Evidence secured by unlawful search of premises not occupied by defendants is competent. Rouda v. U. S. (C. C. A. N. Y. 1926) 10 F.(2d) 916.

Defendant claiming no interest in liquors or manufacturing apparatus seized or to premises which were searched can raise no objection to introduction thereof in evidence on ground of unlawful seizure. Klein v. U. S. (C. C. A. R. I. 1926) 14 F.(2d) 35.

In prosecution against corporation and 13 individuals for conspiracy to obtain release of whisky from bond by means of forged permits, and to sell it unlawfully, in violation of section 88 of Title 18, Criminal Code and Criminal Procedure, if seizure of corporation's papers was illegal under Fourth Amendment, its rights only were invaded, and it alone could object to introduction of papers in evidence. A. Guckenheimer & Bros. Co. v. U. S. (C. C. A. Pa. 1925) 3 F.(2d) 786, certiorari denied (1925) 45 S. Ct. 509, 268 U. S. 688, 69 L. Ed. 1157.

138. **Evidence obtained by search under state laws.**—Intoxicating liquors legally seized in defendant's dwelling under a search warrant issued by a police judge may be used in evidence in a prosecution in a federal court for violation of the National Prohibition Act (incorporated in this title) though a search of the dwelling would not have been permitted under this section, since the purpose of this section was not to establish a special rule of evidence, but to define probable cause for a search. U. S. v. Viess (D. C. Wash. 1921) 273 F. 279.

On a prosecution in the federal court for a violation of the National Prohibition Act (incorporated in this title), bottles of whisky were declared not to be inadmissible in evidence because seized by state officers without a search warrant. U. S. v. O'Dowd (D. C. Ohio, 1921) 273 F. 600; U. S. v. Burnside (D. C. Wis. 1921) 273 F. 603. In the latter case it was said:

"The United States had no part in securing the search warrants in question, nor in executing the same. The proceedings were carried on by the police officers of the city of Superior prior to the time when any proceedings were taken by the United States government, and it appears from the testimony taken in connection with this application that the proceedings by the city officers were entirely independent of the United States government or any of its agents, and that it was some time after the search had been executed and the liquor seized that the police officers of the city of Superior delivered the liquor so seized to the United States attorney for use as evidence in the pending proceeding. While it is well settled that competent evidence tending to prove crime is rendered inadmissible, where it has been secured by federal officers by unlawful search and seizure in violation of the Fourth Amendment, or where its admission is deemed a violation of the Fifth Amendment to the Constitution (Boyd v. U. S. [N. Y. 1886] 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; Adams v. New York [N. Y. 1904] 192 U. S. 585, 24 S. Ct. 372, 48 L. Ed. 575; Weeks v. U. S. [Mo. 1914] 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177), and this rule has recently been applied by the Supreme Court to contraband articles in the case of Amos v. U. S. (S. C. 1921) in an opinion handed down February 28, 1921, 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654, I know of no case where such effect has been given to the trespasses of strangers to the government."

"The fact that the sheriff did not comply with the order of the state court and return the seized property to the defendants, but delivered it to a prohibition officer, did not amount to an illegal search and seizure by the officer, nor compel the defendant to testify against himself, nor did it deprive the government of the right to use it, if otherwise competent and material, as evidence on the trial." McGrew v. U. S. (C. C. A. Mont. 1922) 281 F. 809.

That state constable, procuring search warrant under state law, took federal officers, whom he met accidentally, with him, did not affect admissibility of evidence secured through search in federal

prosecution. Thomas v. U. S. (C. C. A. S. C. 1923) 290 F. 133. And where a federal officer at police headquarters received telephonic information of a violation of law and turned the information over to the city police, and search warrants were taken out by the police and executed on their initiative, the mere presence of the federal officer at the search and participation at the instance of the state officers was held not to render evidence obtained by the search incompetent in the federal court, even if the warrant was invalid. Malacrauis v. U. S. (C. C. A. W. Va. 1924) 299 F. 253. And the fact that prohibition agents, at the request of the police, accompanied them while executing a search warrant procured by them, but took no part in the search, did not render it one made under federal authority, so as to render evidence obtained thereby inadmissible, under Const. Amend. 4. Crawford v. U. S. (C. C. A. Ky. 1925) 5 F.(2d) 672.

A wrongful search and seizure by state officials, under Const. Wash. art. 1, §§ 7, 9, did not affect the admissibility of the liquor and stills seized, in a prosecution in federal court for violation of the National Prohibition Act (incorporated in this title), in absence of a showing that federal officials participated in the search and seizure, or that the federal authorities, to whom the state officials turned over the property seized, knew of the wrongful search and seizure, notwithstanding Const. U. S. Amends. 4, 5. Robinson v. U. S. (C. C. A. Wash. 1923) 292 F. 683, certiorari denied (1924) 44 S. Ct. 330, 264 U. S. 580, 68 L. Ed. 859.

"Evidence procured by state officers by search and seizure without warrant may be introduced upon a trial in the federal court, although the federal officers themselves would be inhibited from making search with or without warrant." Riggs v. U. S. (C. C. A. W. Va. 1924) 299 F. 273.

The fact that liquor was procured through an unlawful search by state officers is not ground for its exclusion as evidence in a federal court. Landwirth v. U. S. (C. C. A. N. J. 1924) 299 F. 281, wherein the court said: "It must not be forgotten that the officers who made the search and seizure were state officers and not officers of the United States. The Fourth and Fifth Amendments were designed to protect citizens from acts of oppression on the part of officers of the United States. Even though the record disclosed an illegal search on the part of state officers—which it does not—their evidence, and evidence procured by them, might have been received."

Evidence secured independently by state police, though through an illegal search and seizure, may nevertheless be used in a prosecution in a federal court. In re Schuetze (D. C. N. Y. 1924) 299 F. 827. The court said: "The Supreme Court of the United States has emphatically held that the constitutional inhibitions, the Fourth and Fifth Amendments, are not directed against the conduct of state officials, either as such or as individuals, and accordingly it follows that when a search and seizure and arrest for federal violation is made by state police on their own initiative and without co-operation with any agency of the United States, or when the arrest or seizure of property is entirely independent of the United States government or its officials, the evidence, though procured by the misconduct of the police, may nevertheless be used in prosecutions in a federal jurisdiction."

But state police, who act under an arrangement with and in aid of prohibition agents, become agents of the United States government, and subject to the Federal Constitution and laws governing the right of search and seizure, and evidence secured through a search by them without a warrant may not be used in a federal prosecution, though the search was authorized for different purposes by a local statute or ordinance. In re Schuetze (D. C. N. Y. 1924) 299 F. 827. The court said: "Raiding methods of search and seizure to procure evidence without warrant find no support in the basic law of the land, and if government agents are permitted to prearrange with the local police department, as they did in this case, that premises of citizens suspected of violating the Volstead Act [incorporated in this title] should be visited and searched without warrant for the purpose of using incriminating evidence for prosecutions in the federal courts, then the protection of the Fourth and Fifth Amendments, declaring the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and against self-incrimination, become empty phrases and of shadowy effect."

Where the evidence on which a prosecution for violation of the National Prohibition Act (incorporated in this title), is based was procured through a search and seizure under a search warrant by police officers, there is no invasion of defendants' rights by federal authority, and the court will not inquire into the legality of the acts of the police. Nunn v. U. S. (C. C. A. Ariz. 1925) 4 F.(2d) 380.

Const. Amend. 4 is no limitation on authority of state officers, and testimony with reference to raids by state officers in which federal officers had no part is admissible in prosecution for conspiracy to violate National Prohibition Act (incorporated in this title). Marron v. U. S. (C. C. A. Cal. 1925) 8 F.(2d) 251.

In liquor prosecution, evidence obtained by a state officer by search and seizure held admissible in federal court, where

he was acting on his own initiative in pursuance of a search warrant procured by him, without the knowledge, instigation, or arrangement with federal officers, who did not participate in the search or seizure, or enter the building until after the liquor had been found by the state officer, and who were present to apprehend automobile, which they had been advised would be carrying liquor, before it had made delivery. U. S. v. Brown (D. C. Or. 1925) 8 F.(2d) 630, affirmed Brown v. U. S. (C. C. A. 1926) 12 F.(2d) 926.

Where a federal prohibition agent participated in a search made by state officers under a search warrant lawful under the state law, but which did not conform to the requirements of the federal law, the search, though directed by the state officers, was unlawful under the federal law, and evidence obtained thereby is not admissible against the owner of the premises in a federal court. U. S. v. Case (D. C. S. D. 1923) 286 F. 627.

139. Objections and determination of admissibility.—Where accused's motion to suppress evidence procured by prohibition agent under void search warrant was denied, his objection to admission of testimony at trial was proper procedure. Bell v. U. S. (C. C. A. Cal. 1925) 9 F.(2d) 820.

In prosecution for unlawful possession and transportation of intoxicating liquor, motion for directed verdict, on ground that officer making search and seizure had no warrant and no reasonable and probable cause to make the seizure, was held equivalent to a motion to exclude evidence so obtained. Lafazia v. U. S. (C. C. A. R. I. 1925) 4 F.(2d) 817.

Where accused did not question validity of search warrant issued by commissioner, or of search, or move to suppress or object to use in evidence of articles seized until trial two years after he pleader not guilty, objections were too late. Souza v. U. S. (C. C. A. Cal. 1925) 5 F. (2d) 9.

In Giles v. U. S. (C. C. A. N. H. 1922) 284 F. 208, it appeared that in the New Hampshire district Giles was indicted for a violation of the National Prohibition Act (incorporated in this title) by unlawfully having in his possession at Concord, N. H., two quarts of alcohol fit for beverage purposes. Pursuing the procedure approved in Weeks v. U. S. (Mo. 1914) 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, Ann. Cas. 1915C, 1177, L. R. A. 1915B, 834, he seasonably filed motions to quash the indictment, alleging that it was founded solely upon evidence obtained by unlawful search and seizure, and for a return of the property so seized. These motions were denied and exceptions duly saved. Just before the trial these motions were renewed, with like result. It was held on the appeal that there was no merit in the government's contention that the defendant's failure again to object to the admission of the seized property as evidence against him amounted to a waiver of his rights. The court said: "There was no occasion for the defendant's counsel by repetition to harass the court that had already ruled and saved the defendant's rights."

Where articles taken from defendant's premises without a search warrant are offered in evidence, and the testimony as to whether he consented to the taking is in conflict, the issue should be determined preliminarily to admission of the evidence, and the hearing should be in the absence of the jury. Miucki v. U. S. (C. C. A. Ill. 1923) 289 F. 47.

Where no application was made before trial for the suppression of evidence as having been obtained through an illegal search and seizure, but objection is made to its admission on the trial, the court may properly consider evidence as to the legality of the search, and in such preliminary inquiry hearsay testimony, which would not be competent to establish the crime charged, may be admissible to show the grounds on which the searching officers acted. Lytle v. U. S. (C. C. A. Ky. 1925) 5 F.(2d) 622.

In prosecution for violation of National Prohibition Act (incorporated in this title) where papers containing incriminating evidence were taken illegally, refusal to allow cross-examination to show that those papers were source of witness' information, as predicate for striking testimony, was held error. Watson v. U. S. (C. C. A. N. J. 1925) 6 F.(2d) 870.

In prosecution for possession of intoxicating liquor in violation of the National Prohibition Act (incorporated in this title) question as to competency of whisky seized during search under warrant, which defendant claimed was incompetent, because there was no probable cause for issuance of warrant, was a question of fact and law for the court, and not for the jury. Steele v. U. S. (1925) 45 S. Ct. 417, 267 U. S. 505, 69 L. Ed. 761.

In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title) admissibility of evidence discovered by prohibition agent in automobile, claimed to be incompetent because search without warrant was unreasonable, was held question for court, and not for jury. Ungerleider v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 604, certiorari denied (1925) 46 S. Ct. 101, 269 U. S. 574, 70 L. Ed. 419.

IV. FORFEITURES

151. In general.—The United States by filing a libel for forfeiture of liquor seized by prohibition agents, acquires no other or greater title to, or right in the liquor than that obtained by the seizure, and when the search warrant under which the seizure was made is vacated, the right of

forfeiture also falls. U. S. v. Specified Quantities of Intoxicating Liquors (C. C. A. N. Y. 1925) 7 F.(2d) 835.

Seizure of liquors and utensils as used or intended to be used in violation of National Prohibition Act (incorporated in this title) being in an illegal way, so that the government's possession was unlawful, such possession cannot sustain a libel for forfeiture and destruction of the property. Daeufer-Lieberman Brewing Co. v. U. S. (C. C. A. Pa. 1925) 8 F.(2d) 1.

Government's unlawful possession of liquor and utensils, when it filed libel for their forfeiture and destruction, was not made lawful as of that time, so as to sustain the libel by subsequent attachment of the property. Id.

Though section 1 et seq. of this title, does not specifically prescribe that its provisions in respect to forfeitures shall be enforced by libel, such proceeding, having long been used to enforce federal statutes where property is sought to be forfeited or destroyed, and being available and appropriate, is valid. Id.

The mere possession of intoxicating liquor by British vessel beyond territorial limits of United States, without any intention to attempt to commit offense against United States laws, is no cause for forfeiture under the treaty with Great Britain of May 22, 1924, but to possess liquor within one hour's sailing distance of the coast with intent to smuggle it into the United States is sufficient ground for forfeiture. The Pictonian (D. C. N. Y. 1924) 3 F.(2d) 145.

Proceedings for the destruction of liquor unlawfully possessed should be brought before the court constructively, either by warrant, libel or otherwise, and the owner given a hearing, after reasonable notice, before destruction thereof. U. S. v. 2,615 Barrels, etc. (D. C. Pa. 1924) 1 F.(2d) 500. The court said: "Though the warrant falls, and the revenue acts do not apply to the case under the facts as appearing, the libel yet will stand, since no previous seizure is necessary, and the same is also based on a violation of the National Prohibition Act [incorporated in this title]. The act provides (section 25 [this section]): 'It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property. * * * If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order.' In the following section (26 [section 40 of this title]) authority is conferred upon the court to dispose of such liquor and property on conviction of the responsible parties by ordering the destruction or sale thereof, unless good cause is shown to the contrary; but where there has been no arrest and conviction, and liquor and property are unlawfully possessed as provided in the preceding section [this section] in order to effect a forfeiture there must be notice and hearing before the disposition of the liquor or property can be effected by the court."

No previous seizure is necessary to enforce a libel against intoxicating liquors unlawfully possessed, under this Act authorizing destruction on conviction, as no property right exists in the liquor. U. S. v. 2,615 Barrels, etc. (D. C. Pa. 1924) 1 F.(2d) 500.

Libel against property seized on search of a brewery, will be dismissed as to a count based on internal revenue laws, since the National Prohibition Act (incorporated in this title) was intended to and does furnish a full, complete, and adequate remedy for enforcement of national prohibition, to which those employed to enforce it should be confined. Id.

Where the evidence in a proceeding to condemn an automobile under state laws demanded as matter of law a finding that it was used by the owner in hauling prohibited liquors, and that the person to whom they were being taken was not as claimed a federal prohibition officer, a verdict condemning the automobile was properly directed. Dutton v. Wood (1923) 115 S. E. 915.

152. Property subject to forfeiture.—Under this section wine possessed for sacramental and religious purposes is subject to seizure and forfeiture for unlawful sales thereof, without criminal prosecution or conviction of owner and without revocation of owner's permit; such permit being no defense where the law is violated. U. S. v. 1,200 Gallons of Wine (D. C. N. Y. 1924) 3 F.(2d) 334.

Under sections 57 to 60 of this title, permitting the manufacture of beer containing more than one-half of 1 per cent. of alcohol, but requiring its reduction below such percentage before withdrawal from the factory, the fact that a permittee, which was lessee of a brewery, allowed the withdrawal of beer without making such reduction, does not subject the brewery equipment, used in the manufacture and owned by the lessor, which was not a party to the unlawful act, to forfeiture under this section. U. S. v. 3,510 Barrels, More or Less, of Beer (D. C. N. J. 1925) 3 F.(2d) 499.

Denatured alcohol, diverted by a truckman from the place to which it was to be delivered, and left in a public garage, under circumstances indicating an unlawful purpose, was held subject to forfeiture. U. S. v. 88 Barrels of Specially Denatured Alcohol (D. C. N. Y. 1925) 4 F.(2d) 752.

This section providing for destruction

of liquor and "all property designed for the unlawful manufacture of liquor," has been held applicable to brewery machinery and appliances used in the illegal manufacture of liquor, and not merely to movable chattels. U. S. v. Auto City Brewing Co. (D. C. Mich. 1925) 5 F.(2d) 362. But another court held that a libel for forfeiture of property seized on a search warrant issued under this section, is applicable only to things which can be taken into the custody of the marshal and removed, and cannot be maintained as to realty, or articles, like fixtures, which form part of the realty. U. S. v. Nine 200-Barrel Tanks (Approximately full) of Beer (D. C. R. I. 1925) 6 F.(2d) 401.

Cargo of liquor on board foreign ship in United States waters without permit was held subject to seizure and forfeiture. The Pesaquid (D. C. R. I. 1926) 11 F.(2d) 308.

Vessel laden with liquor must take reasonable care to keep out of prohibited waters. Id.

Libel of information was held to lie against quantity of whisky seized by United States without search warrant. Avignone v. U. S. (C. C. A. N. Y. 1926) 12 F.(2d) 509.

153. Defenses.—Claim of seizure of liquor by federal officers being unlawful, because made of property already seized by state officials and therefore in custodia legis, is not available as defense to libel of the liquor by the United States; state officers, who made first seizure, having voluntarily surrendered the property to federal officers, and it having been entirely out of possession of state officers when libel was filed. Daeufer-Lieberman Brewing Co. v. U. S. (C. C. A. Pa. 1925) 8 F.(2d) 1.

154. Jurisdiction.—Jurisdiction to condemn or otherwise dispose of intoxicating liquor or property designed for its manufacture is not inherent in courts, but is statutory. Ghisolfo v. U. S. (C. C. A. Cal. 1926) 14 F.(2d) 389.

Under this section, court did not have jurisdiction to condemn or otherwise dispose of intoxicating liquor and property for its manufacture, seized without search warrant, and libel to condemn it must be dismissed. Id.

155. Pleading.—A libel for the forfeiture of liquors may join causes of forfeiture under the National Prohibition Act (incorporated in this title) and under sections 1181 and 1182 of Title 26, Internal Revenue. U. S. v. 385 Barrels, etc., of Wine (D. C. N. Y. 1924) 300 F. 565, wherein the court said: "The exceptions to the second cause of action are for improperly joining in the same libel causes of forfeiture for violation of the Volstead Act [incorporated in this title] and of section 3450 [sections 1181 and 1182 of Title 26]. I am referred to no authority in support of this exception, and in the case of United States v. The Henry L. Marshall (C. C. A. N. Y. 1923) 292 F. 436, there seems to have been a similar joinder. While the particular point now urged does not appear to have been raised in that case, a decision by the District Court, affirmed by a unanimous Circuit Court of Appeals, is at least a warrant for the practice."

A libel for forfeiture under this section which alleged that the liquors "were at the time and place aforesaid used and intended for use in the manufacture, sale, * * * of intoxicating liquor for beverage purposes," has been held sufficiently specific. U. S. v. 385 Barrels, etc., of Wine (D. C. N. Y. 1924) 300 F. 565, wherein the court said: "The claimants except to the first cause of action on the ground that the libel fails to state facts sufficient to constitute a cause of forfeiture. Their contention is that the allegation of the libel to the effect that the intoxicating liquors 'were at the time and place aforesaid used and intended for use in the manufacture, sale, barter, etc., of intoxicating liquors for beverage purposes,' does not state facts, but merely contains a legal conclusion. This is too technical a treatment of a pleading in a civil suit. The decision of Judge Erwin in U. S. v. Horton (D. C. Ala. 1922) 282 F. 731, related to a criminal prosecution. Here the words of the statute are substantially followed, and while the libel does not state who had or possessed the liquor, it is alleged that the offending thing was 'used and intended for use in the manufacture, sale, * * * for beverage purposes,' in violation of the Act. Any further information that may be held necessary may be applied for by motion for a bill of particulars."

A libel against a ship seized under the treaty with Great Britain of May 22, 1924, need not allege that the ship was committing an offense at the time of the seizure, in view of article 2, subd. 2, of the treaty, where the libel alleges that such ship was attempting to make contact with an American vessel, and attempted to smuggle liquor into the United States. The Pictonian (D. C. N. Y. 1924) 3 F.(2d) 145.

A libel for forfeiture of a British vessel for possession of intoxicating liquor in violation of prohibition and internal revenue laws, which contained no allegation as to location of vessel, nor that distance from coast to schooner could be traversed in one hour by vessel endeavoring to commit offense, was held insufficient. Id.

Indefinite allegation, in answer to libels for penalties against ship and forfeiture of cargo, that ship was on the high seas proceeding to foreign port is not in accordance with the requirement of ad-

miralty pleading. The Pesaquid (D. C. R. I. 1926) 11 F.(2d) 308.

In libel against quantity of whisky, libelant, by exceptive allegation to claim, may challenge claimant's title, placing burden of proof thereof on claimant. Avignone v. U. S. (C. C. A. N. Y. 1926) 12 F.(2d) 509.

After decree for libelant against quantity of whisky is reversed, court has power in its discretion to allow libelant to challenge claimant's title by exceptive allegation. Id.

156. Issues.—The title to liquor unlawfully seized is not in issue in a proceeding for its forfeiture and will not be determined as between adverse claimants. U. S. v. A Quantity of Intoxicating Liquors (D. C. Mass. 1923) 289 F. 278.

157. Evidence.—In libel by United States under this section, against beer in possession of cereal beverage manufacturer, evidence held to sustain finding that some of such beer had been used in violation of National Prohibition Act (incorporated in this title) and to warrant conclusion that claimant intended to use remaining beer in like unlawful manner. Hazelwood Brewing Co. v. U. S. (C. C. A. Pa. 1925) 3 F.(2d) 721.

Evidence held to show that ship with cargo of intoxicating liquor was not forced to come within waters of United States by reason of stress of weather. The Pesaquid (D. C. R. I. 1926) 11 F.(2d) 308.

Delay in acting on brewer's application for surrender of permit held to raise inference that brewer had decided to continue to time limit, and that possession of beer of otherwise unlawful alcoholic content was pursuant thereto. U. S. v. Robert Smith Corporation (D. C. Pa. 1924) 15 F.(2d) 448.

On libel by United States against whisky, claimant did not have burden of proving that whisky was obtained under valid permit. Avignone v. U. S. (C. C. A. N. Y. 1926) 12 F.(2d) 509.

158. Decree.—Under this section, machinery and utensils of a brewery, if used or intended to be used in violation of the act, questions of fact, are properly included in decree of forfeiture, and ordered to be destroyed. Daeufer-Lieberman Brewing Co. v. U. S. (C. C. A. Pa. 1925) 8 F.(2d) 1.

§ 40. Unlawful transportation of liquor; seizure and destruction of liquor and sale of vehicle. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this chapter in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the

provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts. (Oct. 28, 1919, c. 85, Title II, § 26, 41 Stat. 315.)

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I. VALIDITY AND OPERATION IN GENERAL

1. Constitutionality.—"This section treats the automobile, as well as its operator, as the offender; and, so construed and applied, it does not deprive the owner of his property in violation of the Fifth Amendment to the Constitution of the United States." Chatham Motor Co. v. Griffith (1924) 157 Ga. 802, 122 S. E. 218.

2. Validity of state laws.—Rev. St. Kan. 21—2162 to 21—2167 is not invalid, because of having broader scope than this section, authorizing confiscation of vehicles used in unlawful transportation of liquor. Van Oster v. State of Kansas (Kan. 1926) 47 S. Ct. 133, 71 L. Ed. —.

3. Repeals.—See, also, notes to sections 3 and 52 of this title.

In view of section 3 of this title, this section will not be held to have impliedly repealed sections 1181 and 1182 of Title 26, Internal Revenue, relative to forfeiture of vehicles, unless in direct conflict therewith. U. S. v. One Ford Coupé Automobile (Ala. 1926) 47 S. Ct. 154, 71 L. Ed. —, reversing decree U. S. v. Garth Motor Co. (C. C. A. Ala. 1925) 4 F.(2d) 523.

In order to establish an implied repeal thereof by this section, there must be shown contradiction justifying court in finding it impossible to permit government choice between two remedies, where the facts bring the offense within the provisions of both statutes. Id.

Sections 1181 and 1182 of Title 26, Internal Revenue, authorizing forfeitures are not, in so far as they apply to intoxicating liquor, superseded by this section. Id.

This section has not modified sections 1181 and 1182 of Title 26, Internal Revenue, as applied to intoxicating liquors, so as to preclude forfeiture of interest in vehicle of one having no guilty knowledge of illegal use. Id.

Prior to the foregoing decision, the cases were in conflict. In the following cases it was held that sections 1181 and 1187 of Title 26, Internal Revenue, were repealed so far as they related to forfeitures for illegal transportation of liquor. U. S. v. Three Quarts of Whisky (D. C.

N. Y. 1925) 9 F.(2d) 208; McDowell v. U. S. (C. C. A. Mont. 1923) 286 F. 521; Lewis v. U. S. (C. C. A. Tenn. 1922) 280 F. 5; U. S. v. One Haynes Automobile (D. C. Fla. 1920) 268 F. 1003.

In the following cases, R. S. § 3450 (sections 1181 and 1182 of Title 26, Internal Revenue) was held not repealed. National Bond & Investment Co. v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 942; U. S. v. One Cadillac Automobile Bearing Motor No. 61-V-238 (D. C. Ill. 1923) 292 F. 773; Reo Atlanta Co. v. Stern (D. C. Ga. 1922) 279 F. 422; U. S. v. One Cole Aero Eight Automobile (D. C. Mont. 1921) 273 F. 934; U. S. v. One Essex Touring Automobile (D. C. Ga. 1920) 266 F. 138.

It has been held that the provisions of the customs statutes for forfeiture of vehicles used in unlawful importations, as applied to intoxicating liquors and their containers, are repealed by this section and section 39 of this title, which cover the same subject. U. S. v. One Packard Motor Truck (D. C. Mich. 1922) 284 F. 394.

But sections 482, 483 and 496 to 498 of Title 19, Customs Duties, authorizing forfeiture of vehicle used for smuggling liquor into country, without regard to owner's innocence, have been held not inconsistent with this section. U. S. v. Cahill (C. C. A. Mass. 1926) 13 F.(2d) 83; U. S. v. One Lincoln Touring Car (D. C. N. Y. 1925) 11 F.(2d) 551.

Law authorizing forfeiture of vessel engaging in unlicensed trade, section 325 of Title 46, Shipping, was held not repealed by this section. The Mineola (C. C. A. Mass. 1927) 16 F.(2d) 844.

4. Construction and effect in general.—An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law having an ample field for operation in effecting a purpose clearly indicated and declared. Street v. Lincoln Safe Deposit Co. (N. Y. 1920) 41 S. Ct. 31, 254 U. S. 88, 65 L. Ed. 151, 10 A. L. R. 1548, reversing (D. C. 1920) 267 F. 706.

The intent of Congress in enacting this section was to penalize only the wrongdoer, and to protect the interests of innocent persons in vehicles unlawfully used. U. S. v. Sylvester (D. C. Conn. 1921) 273 F. 253.

The procedure provided in National Prohibition Act (incorporated in this title), is not merely directory and cumulative, but is jurisdictional. This statute gives a new power, a power to divest title from the owner of property, and the statute provides means of enforcing such power, which is controlling. U. S. v. Hydes (D. C. Wash. 1920) 267 F. 470; U. S. v. Graham (D. C. Wash. 1920) 267 F. 472.

5. Transportation of liquor as nuisance.—In the absence of any evidence that liquor is regularly bartered or sold from an automobile, mere transportation of liquor does not constitute a nuisance, under this section and section 33 of this title. U. S. v. Emmons (D. C. Cal. 1925) 3 F.(2d) 503.

6. Tax on liquor illegally transported.—Under sections 1181 and 1182 of Title 26, Internal Revenue, this section and sections 3 and 53 of this title, unlawfully manufactured intoxicating liquor, seized while being transported, is subject to tax in nature of penalty, though, to warrant imposition of penalties provided for by sections 1181 and 1182, transportation must have been for purpose of evading tax. U. S. v. Milstone (1925) 6 F.(2d) 481, 55 App. D. C. 356.

II. ARREST, SEARCH AND SEIZURE

See, also, notes to sections 611 to 626 of Title 18, Criminal Code and Criminal Procedure.

11. In general.—Under this section providing that on seizure of liquor being illegally transported, the officer shall take possession of the vehicle and arrest any person in charge, and that on his conviction, unless good cause is shown, the court shall order a sale of the property seized, the procedure prescribed is jurisdictional, and the arrest of a defendant for a previous illegal transportation of liquor does not authorize the seizure without warrant, and forfeiture, of an automobile used in such transportation. U. S. v. Hydes (D. C. Wash. 1920) 267 F. 470.

In an action for damages for illegal arrest and imprisonment and illegal search of plaintiff's automobile, where plaintiff sought to recover punitive damages, on the charge that the tort alleged was maliciously committed, it was competent for witnesses to testify that plaintiff had been selling contraband liquor and that they had communicated that fact to defendants. In such action where witness testified that he communicated to defendants information that plaintiff was transporting liquor, court properly refused to require witness to disclose the source of his information. A so-called John Doe search warrant, though invalid, was admissible to refute the charge of malice and wantonness; and such was true as to another search warrant, under which one of the defendants acted, though its period of validity had expired. Elrod v. Moss (C. C. A. S. C. 1921) 278 F. 123.

In such action, where plaintiff had resisted a warrant of state officer to search his car for contraband liquor, and had knocked him from his car to prevent the search, and in flight had thrown a package from his car, whether a federal prohibition officer near by had such direct personal knowledge, through his hearing, sight, or other sense, of the commission of the crime of transporting contraband

liquor, as to warrant his making a search and arrest without a warrant, under this section was held for the jury. Id.

When plaintiff, while resisting arrest, knocked a state officer from his automobile and fled, in defiance of a search warrant, such officer had the right to summon any citizen to his aid in the execution of the warrant, and one so summoned was bound to respond, and such right and obligation to respond was not weakened by the fact that he was a federal prohibition officer. Id.

The arrest of defendant while in the act of unlawfully transporting liquor, as he admitted, and seizure of the liquor, without a warrant, was legal. Bell v. U. S. (C. C. A. Tex. 1923) 285 F. 145, certiorari denied (1923) 43 S. Ct. 521, 262 U. S. 744, 67 L. Ed. 1211.

12. —— Arrest.—Defendant's actions, as disclosed by the evidence, held such as to warrant the prohibition officers in believing that he was at the time transporting liquor in violation of the National Prohibition Act (incorporated in this title), justifying them in arresting him. Lambert v. U. S. (C. C. A. Nev. 1922) 282 F. 413.

If a prohibition agent, having power of arrest, reasonably believed, on the evidence of his own senses, that a defendant was engaged in transporting liquor in violation of the National Prohibition Act (incorporated in this title), in his presence, he had the legal right, under this section, to arrest defendant without a warrant. U. S. v. Daison (D. C. Mich. 1923) 288 F. 199.

Where defendants, charged with bootlegging, were reported to be engaged in the liquor traffic, and were seen by the sheriff driving an automobile and acting suspiciously and mysteriously, and stopped at a house from which a man brought a suitcase, placed it in the automobile, and then drove to the outskirts of the city, it was held, that the sheriff was justified in arresting defendants without a warrant. Id.

A conspiracy to transport liquor in violation of this act is a felony, and persons engaged in such a conspiracy may be arrested without a warrant. The court said: "It is well established that the right of arrest without warrant by a private person, in the absence of restrictive statutes, goes at least this far: That if a felony has in fact been committed, he may so arrest one who is committing it in his presence, or whom he has reasonable ground to suspect of having committed it. An unlawful taking of whisky from a bonded distillery is a felony under section 3268 of the United States Revised Statutes [section 293 of Title 26, Internal Revenue]. A conspiracy to commit an offense against the United States, as transporting liquor in violation of the National Prohibition Act [incorporated in this title] is a felony under section 37 of the Criminal Code [section 88 of Title 18, Criminal Code and Criminal Procedure]. In the circumstances of this case, as hereinabove set forth, a private person would have been justified in arresting the defendants without a warrant and in taking from them the evidences of their crime, either on the ground that a felony had been committed by the unlawful taking of the whisky from the bonded distillery and that there was a reasonable basis for the belief that the defendants were guilty of this felony, or on the ground that the conspiracy to transport the liquor in violation of law was being carried out in the very view of the arresting parties and that the arrest was clearly calculated to prevent the successful consummation of the object of the conspiracy." Brady v. U. S. (C. C. A. Ky. 1924) 300 F. 540. Certiorari denied (1924) 266 U. S. 620, 45 S. Ct. 99, 69 L. Ed. 472.

13. —— Search and seizure.—"The authority to seize, without a warrant, given by this statute, is limited to liquors being transported in any vehicle contrary to law, upon discovery by an officer of a person in the act of so transporting. In construing this statute, the words 'shall discover any person in the act of transporting' have been construed differently in the different Circuit Courts of Appeal and District Courts throughout the country. See Lambert v. U. S. (C. C. A. Nev. 1922) 282 F. 413, 414, 417; U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963, 973; U. S. v. Rembert (D. C. Tex. 1922) 284 F. 996, 1001, 1006; U. S. v. Hilsinger (D. C. Ohio, 1922) 284 F. 585, 588, modified Hilsinger v. U. S. (C. C. A. 1924) 2 F.(2d) 241, certiorari denied (1924) 45 S. Ct. 100, 266 U. S. 622, 69 L. Ed. 473; Elrod v. Moss (C. C. A. S. C. 1921) 278 F. 123; Kathriner v. U. S. (C. C. A. Cal. 1921) 276 F. 808; U. S. v. Bateman (D. C. Cal. 1922) 278 F. 231; Snyder v. U. S. (C. C. A. W. Va. 1922) 285 F. 1, 2, 4; McBride v. U. S. (C. C. A. Ala. 1922) 284 F. 416, 419, certiorari denied (1923) 43 S. Ct. 359, 261 U. S. 614, 67 L. Ed. 827; U. S. v. Slusser (D. C Ohio, 1921) 270 F. 818, 820, 821. We think, however, the true construction and meaning of the statute is that if an officer at the time of the seizure, has ascertained facts, through the exercise of his senses of sight, smell, etc., and from other sources of information, that would justify a reasonably prudent man in believing that the crime of transporting liquor in a vehicle contrary to law was being committed in his presence a seizure would be authorized, and that the seizure in this case would have been authorized had it been made by the federal officer. By this we do not mean that a federal officer, acting under this statute, can make an arrest and seizure on mere suspicion, but that he must

have ascertained at the time facts that would justify a prudent man in believing that a crime was being committed in his presence." Park v. U. S. (C. C. A. N. H. 1924) 294 F. 776.

A prohibition officer or agent is justified in seizing intoxicating liquor or other property without a search warrant only as provided in this section, authorizing such seizure when liquors are found being transported contrary to law. U. S. v. Crossen (D. C. Pa. 1920) 264 F. 459.

Under the provision in this section as to the taking of the vehicle while in the act of illegal transportation the taking of a vehicle subsequent to transportation and without process is without warrant of law. U. S. v. Hydes (D. C. Wash. 1920) 267 F. 470; U. S. v. Graham (D. C. Wash. 1920) 267 F. 472.

In an action for illegal arrest and imprisonment and illegal search of plaintiff's automobile in South Carolina, whether a search of the automobile, made more than a month after date of search warrant, was made within a reasonable time, was held for the jury, though the search warrant described the contraband liquor as "now unlawfully in possession, storage, and keeping"; defendant not being bound as a matter of law to know that all liquor placed in the car before the date of the search warrant had been taken out. Elrod v. Moss (C. C. A. S. C. 1921) 278 F. 123.

In action for false imprisonment and illegal search of plaintiff's automobile there was no merit in a contention that a search warrant in defendant's coat pocket, 10 or 12 feet away at the time of the search, was not in possession of the officer. Id.

Where an automobile and a quantity of intoxicating liquor are seized by prohibition agents in a garage during the absence of the owner and without knowledge, and are held for two years without the institution of any forfeiture proceeding, such seizure constitutes a trespass and the property will be ordered to be returned to its owner. Godat v. McCarthy (D. C. Mass. 1922) 283 F. 689.

The provisions of this section, and sections 44 and 62 of this title, authorizing immediate seizure of vehicles used to transport intoxicating liquors and of the liquor so transported, extending the authority of the court to cases where intoxicating liquors are subject to be destroyed by permitting the court to dispose of them for specific purposes, and regulating the service of summons in certain cases, do not authorize the seizure of property used in violation of the act by common-law libel in rem, instead of by search warrant. U. S. v. Franzione (1923) 286 F. 769, 52 App. D. C. 307.

The taking of an automobile containing liquor by a prohibition officer, pursuant to the provisions of the National Prohibition Act (incorporated in this title) while the automobile was in a garage, did not constitute a seizure under the customs laws, within the meaning of section 515 of Title 19, Customs Duties, limiting time for filing of claims to seized property. Dale v. Hartson (D. C. Wash. 1923) 289 F. 493.

Under this section indictment charging defendant with assault on a prohibition agent while the latter was searching for persons having in possession or transporting intoxicating liquors need not allege that agent had a search warrant where there is no claim that defendant or his property were being searched. Wheeler v. U. S. (C. C. A. Ala. 1923) 293 F. 588, certiorari denied (1924) 44 S. Ct. 333, 264 U. S. 584, 68 L. Ed. 861.

Prohibition agents, who were justified in arresting automobile driver without warrant because of knowledge that he was delivering liquor pursuant to order therefor, had duty of seizing liquor in automobile. Altshuler v. U. S. (C. C. A. Del. 1925) 3 F.(2d) 791.

This section authorizing search without warrant, for intoxicating liquor, of automobiles or other vehicles, is exception to general rule, and does not apply to search of store, dwelling, or other structure. Peru v. U. S. (C. C. A. Neb. 1925) 4 F.(2d) 881.

Carload of intoxicating liquor could be searched and seized without a warrant, while being transported. Nicholson v. U. S. (C. C. A. Ill. 1925) 6 F.(2d) 569.

It is not necessary even in case of federal officers, that they should in all cases have search warrant to justify search and seizure, under this section; Const. Amend. 4, only providing security against unreasonable searches and seizures. Greenberg v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 65.

Section 747 of Title 28, Judicial Code and Judiciary, providing that property taken under revenue law shall be irrepleviable, and deemed to be in "custody of the law," does not apply to seizure under National Prohibition Act (incorporated in this title). The Blairmore I (C. C. A. Conn. 1925) 10 F.(2d) 35.

14. Officers entitled to make seizures.—The power to seize automobile used in the unlawful transportation of liquors, conferred by this section, on the Commissioner of Internal Revenue, "his assistants, inspectors or any officer of the law," does not extend to state officers. U. S. v. One Reo Motor truck (D. C. R. I. 1925) 6 F.(2d) 412.

This section confines the duty of seizure to officers of the United States, and a seizure by police officers on whom such duty is not imposed is without authority, and is not legalized by a subsequent surrender of the property to federal officers. U. S. v. Loomis (C. C. A. Wash. 1924) 297 F. 359, wherein the court said: "The

general rule is that a statute whereby a man may be deprived of his personal property by way of a punishment should be construed with strictness; hence those who assume authority to take possession of such property should have clear warrant for their action. Section 26 of Title 2 [this section] does not expressly mention officers of the state or any local subdivision thereof, and in the absence of including words our construction is that in using the language 'when a commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors,' Congress confined the duty of seizure of the automobile to officers of the United States. See, also, U. S. v. Thomas (C. C. A. Wash. 1924) 297 F. 362.

This section and section 45 of this title, should be construed together, and only officers who are granted powers and protection, under section 45, and not city police officers, were intended to be charged with positive duty, under this section, of seizing intoxicating liquor being transported contrary to law and of taking possession of the conveyance, despite section 591 of Title 18, Criminal Code and Criminal Procedure. The Ray of Block Island (D. C. R. I. 1925) 7 F.(2d) 189, reversed on other grounds (C. C. A. 1926) 11 F. (2d) 522.

But since Const. Amend. 18, vests concurrent enforcement powers in the state, and since section 591 of Title 18, Criminal Code and Criminal Procedure, providing for arrest of offenders against the laws of the United States by state magistrates, agreeably to the usual mode of process against offenders in such state, has been adopted by section 11 of this title, the machinery of this section, relating to the forfeiture of vehicles used in illegal transportation of intoxicating liquors, may be set in motion by a seizure by state officers. U. S. v. Story (C. C. A. Tex. 1923) 294 F. 517.

And municipal police officers' seizure of boat used in violation of National Prohibition Act (incorporated in this title) was held lawful, when ratified by federal officers. The Ray of Block Island (C. C. A. R. I. 1926) 11 F.(2d) 522, affirmed Dodge v. U. S. (1928) 47 S. Ct. 191, 71 L. Ed. —.

15. Property subject to search or seizure.—On the arrest of officers and members of the crew of a steamship for illegal possession and transportation of intoxicating liquors, where there was no charge or evidence that the owners knew the liquor was on board, it was improper to seize the steamship and require a bond for its production as a condition of its release. The Saxon (D. C. S. C. 1921) 269 F. 639.

Under this section, a large iron steamship of 10,000 tons, engaged in general commerce, is not necessarily subject to seizure because liquor was transported thereon through the unlawful act of members of the crew, especially as "boat," "craft," and "water craft" are usually applied to small vessels while larger vessels, especially in the case of large iron steamships, are usually referred to by the terms "steamer," or "steamship," or "vessel." Id.

This section, in connection with section 39 of this title, and section 53 of Title 18, Criminal Code and Criminal Procedure, making it a misdemeanor to search a private dwelling, impliedly recognizes the right to search automobiles. U. S. v. Bateman (D. C. Cal. 1922) 278 F. 231.

The fact that contraband liquor is made by and in possession of a receiver of a state court does not render it immune from seizure by federal prohibition agents. U. S. v. Hilsinger (D. C. Ohio, 1922) 284 F. 585, affirmed Hilsinger v. U. S. (C. C. A. 1924) 2 F.(2d) 241, and certiorari denied (1924) 45 S. Ct. 100, 266 U. S. 622, 69 L. Ed. 473.

Beer containing more than one-half of 1 per cent. of alcohol was contraband, and no property right existed in it, and it was subject to seizure by prohibition officers under this section and section 39 of this title. U. S. v. Westmoreland Brewing Co. (D. C. Pa. 1923) 294 F. 735, affirmed Westmoreland Brewing Co. v. U. S. (1923) 294 F. 740, and certiorari denied (1924) 44 S. Ct. 231, 263 U. S. 722, 68 L. Ed. 525.

The treaty between Great Britain and the United States of May 22, 1924 defines and exclusively determines the status of British vessels lying off the shore of the United States, and visited by boats from shore to obtain contraband liquor, and unless authorized by its terms such vessels are not subject to seizure. The Frances Louise (D. C. Mass. 1924) 1 F.(2d) 1004, appeal dismissed U. S. v. Backman (1926) 46 S. Ct. 209, 270 U. S. 666, 70 L. Ed. 789.

Federal prohibition agents were held authorized to seize trucks and liquor being unlawfully transported therein, which had been seized immediately before and were being held by police officers, though the latter acted without authority. U. S. v. One Reo Motor Truck (D. C. R. I. 1925) 6 F.(2d) 412.

16. Automobiles—When search or seizure justified.—A vehicle may be searched without a warrant where there is reasonable or probable cause to believe that contraband liquor is being illegally transported in it. Carroll v. U. S. (Mich. 1925) 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A. L. R. 790, wherein the court laid down the following propositions: The primary purpose of this section is the seizure and destruction of the contraband liquor, and the provisions for forfeiture of the vehicle and arrest of the transporter are merely incidental. Hence the right to search an automobile for illicit liquor

and to seize the liquor, if found, and thereupon to seize the vehicle also and to arrest the offender, does not depend upon the right to arrest the offender in the first instance, and therefore it is not determined by the degree of his offense,—whether a misdemeanor under section 29 (section 46 of this title), because of being his first or second offense, or a felony because it is his third; and the rule allowing arrest without warrant for misdemeanor only when the offense is committed in the officer's presence, but for a felony when the officer has reasonable cause to believe that the person arrested has committed a felony, is not the test of the validity of such search and seizure. The seizure is legal if the officer, in stopping and searching the vehicle, has reasonable or probable cause for believing that contraband liquor is being illegally transported in it. The language of this section—when an officer shall "discover" any person in the act of transporting, etc.,—does not limit him to what he learns of the contents of a passing automobile by the use of his senses at the time. The section thus construed is consistent with the Fourth Amendment. Probable cause exists where prohibition officers, while patrolling a highway much used in the illegal transportation of liquor, stopped and searched an automobile upon the faith of information previously obtained by them that the car and its occupants, identified by the officers, were engaged in the illegal business of "bootlegging." When contraband liquor, seized from an automobile and used in the conviction of those in charge of the transportation, is shown at the trial to have been taken in a search justified by probable cause, the court's refusal to return the liquor on defendants' motion before trial, even if erroneous because probable cause was not then proven, is not a substantial reason for reversing a conviction. To the same effect, see U. S. v. Stafford (D. C. Ky. 1923) 296 F. 702. For same case at later stage, see Stafford v. U. S. (C. C. A. 1924) 300 F. 537.

A federal prohibition officer may make a search and seizure without warrant, where he has direct personal knowledge, through his hearing, sight, or other sense of a violation of the law. Elrod v. Moss (C. C. A. S. C. 1921) 278 F. 123.

Under this section, providing for seizure and forfeiture of an automobile used by any person "discovered" in the act of illegally transporting liquor, such discovery may be said to have been made when a prohibition agent is induced by the evidence of his senses to believe, on reasonable grounds for belief, that the offense is being committed. U. S. v. Rembert (D. C. Tex. 1922) 284 F. 996.

Under this section, if federal officer has ascertained facts through the exercise of his senses of sight and smell, etc., and from other sources of information, that would justify a reasonably prudent man in believing that the crime of transporting liquor in a vehicle contrary to law was being committed in his presence, a seizure of liquor without a warrant would be authorized. Park v. U. S. (C. C. A. N. H. 1924) 294 F. 776.

Under this section an officer may, if facts and circumstances patent to him are such as would reasonably lead an officer to believe that the law was being violated by the unlawful transportation of intoxicating liquors, search an automobile, and seize liquor, and cause the arrest of the person transporting without a search warrant. The court said: "On the first question, having in view the language of section 26 of title 2 of the National Prohibition Act [this section], viz: 'When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law,'—it is manifest that the words 'shall discover' were intended to be given effect to, having regard to the purposes of the Act to prevent the transportation of liquors in vehicles, which makes it ordinarily impracticable certainly where automobiles are used in the commission of the offense, because of the character of the vehicle and the manner and speed at which the same may be operated, to pursue the usual formality of procuring a search warrant, as where the violation is confined to a particular time and place. In cases of this character, if the facts and circumstances then patent to him were such as would reasonably lead an officer to believe that the law was being violated by the unlawful transportation of intoxicating liquors, he is authorized to seize and hold the same, and cause the arrest of the person so transporting. This is the spirit and meaning of the decision of this court rendered at the February term, 1924, in Milam v. United States (C. C. A. Va. 1924) 296 Fed. 629, to which, and the authorities therein cited, reference is made, and under that decision the testimony of the officers in this case was properly received." Ash v. U. S. (C. C. A. W. Va. 1924) 299 F. 277.

Under this section, prohibition officer had right to stop automobile and search for liquor, if facts and circumstances would have caused reasonably cautious man to believe that intoxicating liquors were being transported. Lafazia v. U. S. (C. C. A. R. I. 1925) 4 F.(2d) 817.

If federal prohibition officer had learned of facts by the use of his senses and from other sources that would have warranted a reasonably prudent man in believing that automobile driver was trans-

porting liquor in his presence in violation of this section, he would have been justified in using reasonable means to stop the car to effect a seizure, having first disclosed his official capacity. Pales v. Paoli (C. C. A. Porto Rico, 1925) 5 F.(2d) 280.

Probable cause, justifying search of automobile for liquor, did not exist, unless facts and circumstances within officer's knowledge would warrant belief that liquor was being transported therein. Emite v. U. S. (C. C. A. Tex. 1926) 15 F.(2d) 623.

Search and seizure of automobile on public highway is legal, when facts and circumstances within knowledge of seizing officers, and of which they have reasonable trustworthy information, are such in themselves as to warrant a man of reasonable caution in belief that intoxicating liquor was being transported therein. U. S. v. Allen (D. C. Fla. 1926) 16 F.(2d) 320.

Defendant's actions, as disclosed by the evidence, held such as to warrant the prohibition officers is believing that he was at the time transporting liquor, justifying them in arresting him and seizing and searching his automobile. Lambert v. U. S. (C. C. A. Nev. 1922) 282 F. 413.

Under this section authorizing seizure of vehicles and liquors found being transported therein in violation of law, where liquor carried in fruit jars on the rear seat of an automobile could be seen by merely looking in the car, the discovery of whisky by this means and its seizure without warrant were expressly authorized. Boyd v. U. S. (C. C. A. S. C. 1923) 286 F. 230.

That automobile being used in transporting liquor in violation of this section was disabled and not moving when seized by prohibition agents was held not to render seizure unlawful. U. S. v. Bierd (D. C. Wash. 1924) 295 F. 148.

Where prohibition agents, having definite information that professional criminals were conveying in a motor car a quantity of whisky along a certain road about a certain time, and who were on the watch to intercept it, stopped defendants' truck, opened it, and found a number of Chinese in the course of unlawful transportation, the search was not unreasonable nor unlawful, though made without a warrant, and the evidence thereby obtained was competent against defendants. Milam v. U. S. (C. C. A. Va. 1924) 296 F. 629, certiorari denied (1924) 44 S. Ct. 460, 265 U. S. 586, 68 L. Ed. 1192.

Where prohibition officers saw something in an open car, covered up, and, turning their car around, started to follow, when the other car so increased its speed that it was wrecked at a turn, the officers were warranted in arresting the persons driving the car and in making a search of the car, wherein they found intoxicating liquors; they sincerely believing that the car was engaged in transporting whisky, and the result showing that their belief was sound. U. S. v. Stafford (Ky. 1923) 296 F. 702. For same case at later stage, see Stafford v. U. S. (C. C. A. 1924) 300 F. 537. The court said:

"In every case where there is some evidence tending to show that an offense is being committed, and it is such as to cause the officer sincerely to believe that such is the case, and it turns out that his belief is correct, the arrest and subsequent search and seizure are legal. Whilst it may be the fact that, at the time of the arrest and search, he does not know what he subsequently discovers, yet the fact that the belief is found to be correct accredits the belief, and gives weight to the evidence on which the officer acted. He was on the ground, and he was acting under oath. It is not always possible for one to convey to another what he has observed as vividly as it appeared to him. It is on this ground that the opinions of common observers as to matters of fact are often admitted in evidence on a trial thereof. Possibly, by reason of experience, he is more skilled than the trial judge in determining the meaning of things in such cases. One apprehended whilst violating the law, and thereby prevented from continuing such violation, is not entitled to any further consideration. In determining the law as to the right of arrest, cases in which the officer has made a mistake are not pertinent. Those only are pertinent where he has made no mistake. A violator of the law, caught red-handed, is not entitled to shield himself under the law applicable to a nonviolator. The two do not stand on the same footing, and should not be placed there.

"As bearing on the stopping and searching of automobiles on account of violations of the National Prohibition Act [incorporated in this title], it is to be noted that that Act makes it the duty of the prohibition agents to seize any and all intoxicating liquors found being transported contrary to law in any vehicle, and the vehicle itself, when they 'shall discover' that they are being so transported, without prescribing any limitations as to the efforts taken to so discover, and further that the Act of November 23, 1921 [incorporated in part in section 53 of Title 18, Criminal Code and Criminal Procedure], making it an offense for such agents to search any other building or property than a private dwelling without a search warrant, prescribes that, in order for such to be an offense, it is essential that the search be made 'maliciously and without reasonable cause.' Under the latter Act it is not sufficient that the search be made without reasonable cause. It is essential, further, that it be made maliciously."

Where defendant made a sale of liquor, which he was transporting in an automobile, of which sale prohibition agents had knowledge, they were authorized, under this section, to seize the liquor, and it was admissible in evidence against defendant in a prosecution for unlawful transportation. Reyff v. U. S. (C. C. A. Cal. 1924) 2 F.(2d) 39.

Prohibition agents, who, after delivery of beer at saloons from a certain brewery, purchased in such saloons beer containing more than the lawful percentage of alcohol, stopped a truck loaded with beer from the same brewery on the street in the daytime, without a warrant, and took therefrom four kegs of beer. It was held that such seizure was not unreasonable and was lawful. Hilsinger v. U. S. (C. C. A. Ohio, 1924) 2 F.(2d) 241, affirming U. S. v. Hilsinger (D. C. 1922) 284 F. 585. Certiorari denied Hilsinger v. U. S. (1924) 45 S. Ct. 100.

Where bags being carried from automobile by person when arrested contained whisky, search of the automobile without a warrant was not unreasonable. Fisher v. U. S. (C. C. A. W. Va. 1924) 2 F.(2d) 843, certiorari denied (1924) 45 S. Ct. 128, 266 U. S. 629, 69 L. Ed. 476.

Prohibition agents, who knew that defendant had received telephonic order for delivery of liquor at certain time and place, and who knew defendant's automobile license, had a right to intercept and arrest him and search automobile without warrant, without having actually seen liquor in automobile, in view of section 616 of Title 18, Criminal Code and Criminal Procedure, and this section. Altshuler v. U. S. (C. C. A. Del. 1925) 3 F.(2d) 791.

Where loaded truck was moving at an unusual hour on a stormy night from place where information had been received that intoxicating liquors were to be landed, and cases in which intoxicating liquor is usually packed could be seen through latticed sides of truck, prohibition officers were justified, under this section, in stopping truck and in making search and seizure of liquor found therein, and in making arrest of person in charge thereof, without a warrant. Lafazia v. U. S. (C. C. A. R. I. 1925) 4 F.(2d) 817.

Prohibition officer who searched automobile for intoxicating liquor without warrant held to have reasonable grounds for search. Ungerleider v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 604, certiorari denied (1925) 46 S. Ct. 101, 269 U. S. 574, 70 L. Ed. 419.

Search of an automobile by prohibition agents held not unreasonable, where they believed, on reasonable grounds, that it was being used for the illegal transportation of liquor. Lytle v. U. S. (C. C. A. Ky. 1925) 5 F.(2d) 622.

Where officer, knowing that defendant had been mixed up in liquor transactions, became suspicious on seeing cartons partially covered in defendant's automobile, and arrested defendant without warrant after he had admitted that he had "three boxes of corn" held arrest was justified, and search incidental thereto not unreasonable, in view of this section. Cohn v. U. S. (1926) 16 F.(2d) 652, —— App. D. C. ——.

17. —— When not justified.—Where a prohibition agent observed what he thought were indications that the driver of an automobile was intoxicated, and without a search warrant stopped and searched the automobile with a drawn pistol in his hand, and found liquor in the automobile, such search was illegal, under Const. Amend. 5, as to compelling one to give evidence against himself; the mere supposition that the driver of the automobile was intoxicated not bringing the facts within the principle of cases dealing with palpable violations of law, such as where an officer sees liquor being loaded on an automobile, or plainly sees liquor leaking from a vehicle in which it is being transported. Incidentally this conclusion may be aided by the provisions of the Fourth Amendment. U. S. v. Myers (D. C. Ky. 1923) 287 F. 260.

Arrest of defendant on mere suspicion that package which he was carrying and had taken from car contained bottles of liquor, and fact that officer had been informed that defendant was bootlegger and given license number of car which he drove was held invalid, as not on reasonable cause. Brown v. U. S. (C. C. A. Or. 1925) 4 F.(2d) 246.

That automobile moving on public highway appears heavily loaded and driven carefully does not warrant search thereof for liquor without warrant. Emite v. U. S. (C. C. A. Tex. 1926) 15 F.(2d) 623.

Search of automobile without warrant is not justified by suspicion, based on fact that it came from place having reputation as haven for bootleggers and was seen parked at place said to be used by cars hauling liquor. Id.

18. Vessels and boats.—Seizure of liquor-laden British vessel lying 5.7 miles from the Farallon Islands, territory of the United States, 25 miles west from San Francisco, held not unlawful, under treaty between Great Britain and the United States. Ford v. U. S. (Cal. 1927) 47 S. Ct. 531, 71 L. Ed. ——.

If a prohibition agent, having power of arrest, reasonably believed, on the evidence of his own senses, that a defendant was engaged in transporting liquor in violation of the National Prohibition Act (incorporated in this title) in his presence, he had the legal right, under this section, to arrest defendant, to

search the motorboat in which defendant then was and to seize the boat and liquor found therein without a warrant. U. S. v. Daison (D. C. Mich. 1923) 288 F. 199.

On lawful arrest of a person for violation of the National Prohibition Act (incorporated in this title) search of a motorboat in which he was at the time of arrest was legal without a warrant, and where liquor was found therein both liquor and boat were lawfully seized. Id.

Seizures and libels under treaty between Great Britain and the United States of May 22, 1924, in which Great Britain agrees to make no objection to the boarding and seizure of private vessels violating United States' laws within one hour's sailing distance of coast, was held authorized as against objection that Congress has not by law declared acts denounced by this section and various other sections to be crimes when committed beyond 3 and 12 mile limits. The Pictonian (D. C. N. Y. 1924) 3 F.(2d) 145.

Where prohibition officers, on approaching motorboat, asked defendant in charge what he had in it, to which he replied, "Beer," held such facts amounted to "discovery," justifying seizure of liquor and arrest of defendant, under this section, nor was such arrest and seizure violative of Const. Amend. 4, prohibiting unreasonable seizures and searches. Daisen v. U. S. (C. C. A. Mich. 1925) 4 F.(2d) 882.

Under British treaty of May 22, 1924, vessel violating National Prohibition Act (incorporated in this title) within limits prescribed may be seized, but act which would not violate our laws in absence of treaty is not made a crime for which vessel may be seized by the treaty. The Over the Top (D. C. Conn. 1925) 5 F.(2d) 838.

The right of the United States to seize and search vessels for violation of law is not limited to any particular distance from shore, seizure outside the territorial limits being subject only to diplomatic considerations, and such right as to British vessels is not affected by the treaty. The Panama (D. C. Tex. 1925) 6 F.(2d) 826.

Possession of alcohol on board American vessel beyond 12-mile limit was held not illegal per se, so as to render it subject to seizure under National Prohibition Act (incorporated in this title). U. S. v. Tello (D. C. Mass. 1925) 6 F.(2d) 579.

Seizure of ship upon the open seas, 25 nautical miles off Montauk Lighthouse, 7 months after alleged offenses against the Volstead Act (incorporated in this title) and Tariff Act (chapter 3 of Title 19, Customs Duties) was held not shown to be invalid, in absence of any allegation that ship was foreign vessel. The Homestead (D. C. N. Y. 1925) 7 F.(2d) 413.

Power of government to arrest ship and those thereon, seeking to import liquor into United States, under treaty between United States and Great Britain (article 2, § 3), extends to distance which can be traveled in one hour from coast line proper, and not from beacon on reef in sea. U. S. v. Henning (D. C. Ala. 1925) 7 F. (2d) 488, reversed on other grounds Hennings v. U. S. (C. C. A. 1926) 13 F.(2d) 74.

In treaty between United States and Great Britain (article 2, § 3), giving power to arrest ships and those thereon, seeking to import liquor within one hour's sailing distance from coast of United States, its territories or its possessions, word "possessions" has reference to such territories and possessions as Porto Rico and Hawaii and not to beacons or marine structures beyond coast line. Id.

In (1922) 33 Op. Atty. Gen. 352, it was held that the seizure of liquors on board the Patricia, an American-owned vessel, by the customs officers at Miami, Fla., was lawful and such liquors not subject to return to the owner of the vessel.

19. Custody and disposition of property.—Under this section the court is without authority to return to the owner a vehicle used in the illegal transportation of liquors, unless the owner shows absence of guilty knowledge. U. S. v. Burns (D. C. Ohio, 1921) 270 F. 681. An owner of an automobile, who loaned it to another without knowledge that it was to be used for the unlawful transportation of liquor, and without information which should have aroused his suspicions, is entitled to a return of the vehicle to him after its seizure while being used in such unlawful transportation. U. S. v. Sylvester (D. C. Conn. 1921) 273 F. 253.

It has been held that a lienor or mortgagor is not entitled to have a vehicle which has been seized for a violation of this act returned to him and thus permit him to profit by the transaction but that he must look for reimbursement to the extent of his lien from the proceeds of the sale. U. S. v. Sylvester (D. C. Conn. 1921) 273 F. 253, wherein the court said:

"Cases may arise where the application of this rule would result in realizing an insufficient amount at the sale to pay the full amount of the bona fide lien; but where a substantial amount has already been paid, as here, on a new truck, undoubtedly the full amount of the balance due, plus the costs, will be realized, so that the lienor will be fully protected. Where, however, the amount paid by the purchaser is small in proportion to the purchase price, so that a large amount will have to be realized by the United States marshal at the sale, and where the highest bid is insufficient to meet the costs and the amount of the bona fide lien, the United States marshal shall then abandon the sale and report the facts to the court for further instructions. In such event fur-

ther hearing will be had before the court to determine then whether the llenor has shown 'good cause' why the vehicle should not be sold."

To the same effect see Jackson v. U. S. (C. C. A. Ariz. 1924) 295 F. 620, reversing (D. C. 1923) 289 F. 127; Oakland Motor Car Co. v. U. S. (C. C. A. Cal. 1924) 295 F. 626; U. S. v. Smith (D. C. Wash. 1920) 295 F. 624.

The prohibition enforcement officers are not officers of the court, and therefore the court cannot in summary proceedings order them to return an automobile seized while being used for the transportation of intoxicating liquor, since the court's power in such proceedings exists only over its officers. Lewis v. McCarthy (D. C. Mass. 1921) 274 F. 496.

Evidence held insufficient to sustain claim that liquors seized by the government in shipment were the property of claimant, and had been stolen from him and reshipped when seized. In re Disposition of Certain Intoxicating Liquors (D. C. Pa. 1921) 275 F. 852.

The United States is not a "third person" within the meaning of a state statute providing that an unrecorded conditional sale contract shall be void as to third persons, as the statute refers only to such third persons as have relied to their prejudice on the vendee's apparent unqualified ownership. Hence after the conviction of a defendant under section 12 of this title, for transporting liquor, a claimant under a conditional sale contract is entitled to have the truck used in such transportation returned to him on proper proof. U. S. v. Torres (D. C. Md. 1923) 291 F. 138.

Where defendant, while in an automobile, sold and received payment for liquor, which he stated was in the back of the car, and by direction of the purchaser drove to a garage to deliver it, where he was arrested and the liquor seized, title to the liquor had passed to the purchaser, and defendant was not entitled to an order for its return. Reyff v. U. S. (C. C. A. Cal. 1924) 2 F.(2d) 39.

Property not necessarily incapable of ownership under this section, should be returned to the owner on quashing search warrant under which it was seized, unless condemnation proceedings are promptly instituted. Hammerle v. U. S. (C. C. A. Ky. 1925) 6 F.(2d) 144.

Ship captured in violation of National Prohibition Act (incorporated in this title) was held not entitled to safe conduct, because it was taken into port in wrong district. The Blairmore I (C. C. A. Conn. 1925) 10 F.(2d) 35.

20. —— **Release on bond.**—By the provisions of this section, the vehicle after seizure may be instantly returned to the owner, upon execution by him of a bond to produce the property at the criminal trial, and disposition must be decreed upon the trial of the criminal case. Forfeiture by original seizure depends upon the statute. Congress may declare the forfeiture absolute upon seizure, or make the forfeiture depend upon conditions. The Congress may provide for the seizure of the vehicle at any time, for having offended, but before any forfeiture can be decreed, the jurisdictional facts as outlined by the statute must be present, and the statutory provision must be in harmony with the taking or detention. U. S. v. Hydes (D. C. Wash. 1920) 267 F. 470; U. S. v. Graham (D. C. Wash. 1920) 267 F. 472.

Where the seizure of a vehicle subsequent to the act of transportation was without warrant of law it has been held that an order decreeing the return of the vehicle and exonerating the owner's bond may be presented. Id.

Where an automobile was used in the illegal transportation of liquor, and was seized, but released to the owner on giving bond, since the automobile may not be forfeited until the driver is convicted of the offense of illegally transporting liquor, the automobile cannot be released, and the bond canceled until the expiration of the time within which the trial can be had. U. S. v. One Cadillac Touring Car (D. C. Mich. 1921) 274 F. 470.

Vessels and property seized by the United States for violation of liquor laws will not be released on bond, owners having adequate remedy in case seizure is illegal. The Frances Louise (D. C. Mass. 1924) 1 F.(2d) 1006.

Statutes relating to bonding of vessel seized for violation of revenue and prohibition acts are mandatory, irrespective of prior seizures. The California (D. C. N. Y. 1926) 12 F.(2d) 270.

Release on bond of vessel seized for violation of this section, is mandatory. The Lynx II (D. C. N. Y. 1926) 14 F.(2d) 697.

This section confers no authority to release a vessel libeled for its violation on application and bond by a mortgagee or other person than the owner. The Mary J. Beale (D. C. N. Y. 1926) 16 F.(2d) 129.

Where failure to produce automobile in government's libel for forfeiture was due to no fault of accused, but because of fact that machine was destroyed by fire, principal and surety will not be held liable for full amount of bond under which car was released, but only for value of car at time of its destruction. U. S. v. One Ford Automobile (D. C. La. 1926) 18 F.(2d) 338.

21. —— **Offenses respecting seized property.**—Where United States marshal had seized automobile used in transportation of intoxicating liquor, conspiracy to deprive the United States of its title and possession was conspiracy to defraud the United States of property interest, in violation of section 88 of Title 18, Criminal Code and Criminal Procedure, whether the

automobile had been obtained by legal or illegal seizure. Cagle v. U. S. (C. C. A. Tenn. 1925) 3 F.(2d) 746.

Custody of garage keeper, holding by direction of marshal, was held sufficient possession by United States to sustain prosecution, under section 88 of Title 18, Criminal Code and Criminal Procedure, for conspiracy to defraud the United States of title and possession of automobile, seized by marshal because used in transportation of intoxicating liquor. Id.

Defendant, who offered to pay other persons certain amount if they would get possession of automobile, which had been seized by United States marshal, and deliver it to certain place, was guilty of conspiracy to defraud the United States, under section 88 of Title 18, Criminal Code and Criminal Procedure, when offerees acted on offer, though, after taking possession of automobile, they abandoned it without delivery at such place. Id.

In prosecution under section 88 of Title 18, Criminal Code and Criminal Procedure for conspiracy to defraud the United States of the title and possession of an automobile, seized by the marshal because used in transportation of liquor, allegation that United States was in actual possession was unnecessary; charge that government had interest therein being sufficient. Id.

22. Admissibility of evidence.—Liquor lawfully seized under this section was admissible as evidence in liquor prosecution. Altshuler v. U. S. (C. C. A. Del. 1925) 3 F.(2d) 791.

Carload of intoxicating liquor searched and seized without a warrant, while being transported, could be used in evidence, in prosecution for violation of prohibition law. Nicholson v. U. S. (C. C. A. Ill. 1925) 6 F.(2d) 569.

Liquor disclosed by search incidental to unjustifiable arrest without warrant is inadmissible, in prosecution for unlawful transportation in view of this section. Morgan v. State (Ind. 1926) 151 N. E. 98, 197 Ind. 374.

Where search of automobile for liquor by prohibition officers was without a warrant and without reasonable cause to believe that a crime was being committed in their presence, evidence obtained thereby was held inadmissible in liquor prosecution. Emite v. U. S. (C. C. A. Tex. 1926) 15 F.(2d) 623.

III. FORFEITURES

31. Introductory.—Most, and perhaps all, of the cases from the lower courts cited in this subdivision were decided prior to the decision of the Supreme Court in U. S. v. One Ford Coupé Automobile (1926) 47 S. Ct. 154, 71 L. Ed. ——. Such of them as relate to sections 1181 and 1182 of Title 26, Internal Revenue (R. S. § 3450) should be compared with that case.

32. In general.—The forfeiture of a vehicle used for the unlawful transportation of intoxicating liquor under this section, is not absolute, as was the forfeiture of conveyances used in the removal of liquor on which the revenue tax was not paid, under R. S. § 3450 (sections 1181 and 1182 of Title 26, Internal Revenue). U. S. v. Brockley (D. C. Pa. 1920) 266 F. 1001; U. S. v. Sylvester (D. C. Conn. 1921) 273 F. 253.

Prohibition agents who have seized liquor under a valid search warrant under this section and section 39 of this title have no right to destroy it without an order of court. In re Quirk (D. C. N. Y. 1924) 1 F.(2d) 484. The court said: "The government, however, argues for a broader rule, namely, that the prohibition agents have the right to destroy the liquors without a court order. It is pointed out by the regulation promulgated by the Treasury Department under revenue laws that distilling apparatus of a certain kind, and which was impracticable for removal to a safe place of storage, may be destroyed by the officer; that it is shown that the prohibition agents executing the search warrant in question did in fact make a departmental return on form 407, wherein it was stated that the ground of destruction of part of the liquor seized was owing to the impracticability of removing it to a safe place of storage. This rule or regulation, limited to the destruction of certain stills, however, does not apply and is not consistent with sections 25 and 26 of the National Prohibition Act [sections 39 and 40 of this title] for by section 26 it is substantially provided that, whenever intoxicating liquor transported or possessed illegally is seized, the officers shall proceed against the person arrested and 'the court, upon conviction of the person so arrested, shall order the liquor destroyed;' while section 25 authorizes the issuance of a search warrant for illegal possession of liquor or property designed for the manufacture of the same, and states that 'such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof,' and the provision moreover empowers the court in a proper case to destroy the liquor or property seized 'unless the court shall otherwise order.' In construing these provisions, Judge Morris, in U. S. v. Certain Quantities of Intoxicating Liquor (D. C. N. H. 1923) 291 F. 717, substantially held that under section 26 the intoxicating liquors seized are subject to destruction without notice or hearing, but that under section 25, where there has been no conviction, there must be notice of hearing before destruction or disposition thereof. The learned court said: 'The words, "If it is found," etc., imply that there must be notice and hearing before any disposition of the liquor or prop-

erty seized can be disposed of by the court. An essential difference between the two sections of the statute is that under the provisions of section 25 a question of fact is left open for the determination of the court. If upon hearing it is found that the liquor was being "unlawfully held, or possessed, or had been unlawfully used," it is then subject to destruction or such other order as the court may make.'" See to the same effect U. S. v. Cooper (D. C. Mass. 1924) 295 F. 709.

The word "removed," in sections 1181 and 1182 of Title 26, Internal Revenue, providing for forfeiture of vehicles used, when goods subject to tax are removed with intent to defraud the United States of the tax, means a removal from some definite place of manufacture or storage to some other place, and does not mean the same as "transported," as used in National Prohibition Act (incorporated in this title) which means carried or taken from one place to another. U. S. v. One Buick Sedan Automobile (D. C. Cal. 1924) 1 F.(2d) 997.

33. Statute applicable.—It has been held that automobile used for deposit and concealment of liquor, with intent to defraud the United States of tax thereon, is forfeitable only under this section preserving the rights of innocent owners or lienholders. Marmon Atlanta Co. of Georgia v. U. S. (C. C. A. Ga. 1925) 8 F.(2d) 267, reversing U. S. v. One Marmon Automobile (D. C. 1925) 5 F.(2d) 113. But see U. S. v. One Ford Coupé Automobile (1926) 47 S. Ct. 154, 71 L. Ed. ——.

This section, providing for forfeiture of automobiles used for removal or transportation of intoxicating liquor, applies, whether automobile be actually in motion or not. U. S. v. Garth Motor Co. (C. C. A. Ala. 1925) 4 F.(2d) 528, certiorari granted U. S. v. One Ford Coupé Automobile No. 4,766,501, Alabama License No. 100,-978 (1925) 45 S. Ct. 640, 268 U. S. 687, 69 L. Ed. 1157, and reversed on other grounds (1926) 47 S. Ct. 154, 71 L. Ed. ——.

Proceedings to forfeit vehicles used in the importation of liquor must be brought under this section, and cannot be brought under the Customs Laws, permitting judgment of forfeiture invalidating bona fide lien; the National Prohibition Act (incorporated in this title) having superseded the customs laws prohibiting the importation of liquor. Vehicles used in importation of liquor cannot be forfeited under the Customs Laws providing for judgment of forfeiture invalidating bona fide lien, instead of under this section, on the theory that there was direct violation of the Customs Laws in regard to the importation of the glass bottles containing the liquor since the transaction cannot be split into separate parts so as to create two crimes and since the Prohibition Act protects bona fide lienors regardless of the containers in which the liquor being imported is carried. U. S. v. One Paige Automobile (D. C. Tex. 1922) 277 F. 524.

Section 483 of Title 19, Customs Duties, authorizing forfeiture of vehicles carrying merchandise unlawfully imported, has no application to importation of intoxicating liquors, in violation of National Prohibition Act (incorporated in this title) prior to enactment of Supplemental Act Nov. 23, 1921 (see section 2 of this title). U. S. v. One Mack Auto Truck (C. C. A. N. Y. 1925) 4 F.(2d) 923.

A gasoline launch, used to unlawfully import liquor from Canada, was not forfeitable under R. S. § 3061 et seq. (section 482 et seq. of Title 19, Customs Duties), but only under this section, as to forfeiture of vehicles when transporting liquor; the latter remedy being exclusive, and section 3061 et seq. applying only where the article imported is merchandise and can be entered at the custom house. The Goodhope (D. C. Wash. 1920) 268 F. 694.

34. —— Sections 1181 and 1182 of Title 26.—After conviction of driver of automobile under this section, disposition of automobile as prescribed in act became mandatory, and, being inconsistent with disposition under sections 1181 and 1182 of Title 26, Internal Revenue, precluded resort to proceedings thereunder. Port Gardner Inv. Co. v. U. S. (Wash. 1926) 47 S. Ct. 165, 71 L. Ed. ——.

To the same effect, see Commercial Credit Co. v. U. S. (C. C. A. Wash. 1927) 17 F.(2d) 483.

The provisions of sections 1181 and 1182 of Title 26, Internal Revenue, for forfeiture of vehicles used in removal of articles with intent to defraud the United States of the tax due thereon, cannot be applied to the mere transportation of liquor in violation of the National Prohibition Act (incorporated in this title), unless the circumstances warrant a fair and reasonable inference that there was also an intent to defraud the government of a tax payable thereon. U. S. v. One Buick Sedan Automobile (D. C. Cal. 1924) 1 F.(2d) 997.

Libel to enforce forfeiture of automobile may, under Willis Campbell Act, supplemental to Prohibition Act, approved Nov. 23, 1921 (see sections 2 and 3 of this title) be maintained under sections 1181 and 1182 of Title 26, Internal Revenue, if used in the removal or for the deposit and concealment of goods subject to tax and for purpose of avoiding the tax, though, if charge is merely that of unlawful transportation, not involving evasion of tax, proceedings must be maintained under this section. U. S. v. One Bay State Roadster (D. C. Conn. 1924) 2 F.(2d) 616.

A person arrested for unlawful transportation of liquor was using a leased automobile. No claim was made that there

was any tax due on the liquor. Held, that sections 1181 and 1182 of Title 26, Internal Revenue, had no application, but the question of forfeiture of the car was governed by this section, and it being shown that the unlawful use was not known to the owner and was in violation of the terms of the lease that it was not subject to forfeiture. U. S. v. Deutsch (D. C. N. J. 1925) 8 F.(2d) 54.

Since in January, 1921, no authority existed under sections 1181 and 1182 of Title 26, Internal Revenue, for confiscation of automobile illegally engaged in liquor traffic, confiscation at that time was under this section, section 3 of this title reenacting all laws in force when National Prohibition Act (incorporated in this title) became effective, not being enacted until November 23, 1921. Midland Motor Co. v. Norwich Union Fire Ins. Soc. (Mont. 1925) 234 P. 482, 72 Mont. 583.

This section does not abrogate or prevent absolute forfeiture of a vessel under sections 1181 and 1182 of Title 26, Internal Revenue, or section 325 of Title 46, Shipping. The Cherokee (D. C. Tex. 1923) 292 F. 212.

It has been held that the provision of sections 1181 and 1182 of Title 26, Internal Revenue, for forfeiture of any vehicle used in the removal or concealment of a taxable commodity, "with intent to defraud the United States of such tax," is not applicable to the removal or concealment of intoxicating liquor manufactured since the National Prohibition Act (incorporated in this title) became effective. One Ford Touring Car v. U. S. (C. C. A. Ark. 1922) 284 F. 823. And where a vehicle used for the illegal transportation of liquor is subject to forfeiture under this section, it has been held not forfeitable under sections 1181 and 1182 of Title 26, Internal Revenue; the two statutes being in direct conflict as to the rights of a good-faith owner or lienholder. Commercial Credit Co. v. U. S. (C. C. A. Ohio, 1925) 5 F.(2d) 1. And sections 1181 and 1182 of Title 26, Internal Revenue, are said not to be applicable to case of forfeiture, wherein National Prohibition Act (incorporated in this title) requires conviction of offender. U. S. v. One Reo Truck Automobile (C. C. A. N. Y. 1925) 9 F.(2d) 529. The cases cited in this paragraph, however, seem to be inconsistent with U. S. v. One Ford Coupe Automobile (Ala. 1926) 47 S. Ct. 154, 71 L. Ed. ——.

35. Property subject to forfeiture.—Manifesting intoxicating liquor as "ship's stores," under R. S. § 2809 (repealed), and their surrender to the customs officers did not render them subject to forfeiture under this section, though they should have been reported under R. S. § 2774 (repealed). U. S. v. Two Hundred and Fifty-Four Bottles of Intoxicating Liquor (D. C. Tex. 1922) 281 F. 247.

Possession of intoxicating liquors on the high seas by captain of a vessel owned and operated for the account of the United States Shipping Board Emergency Fleet Corporation was illegal, and they were subject to forfeiture under this section, the ship being a part of the territory of the United States. Id.

A taxicab company, engaged in the business of transporting passengers and baggage for hire, and holding itself out as ready to serve the public in that capacity whenever called on, must exercise reasonable vigilance to prevent use of its transportation facilities for the unlawful transportation of intoxicating liquor. Where long-distance taxicab trips were not so numerous that it was impossible for taxicab company's managing officers to control this branch of its business, and its superintendent was informed by driver called to saloon at 2 a. m. that passenger wanted to be driven from Pittsburgh to Cleveland, forfeiture of the taxicab for the transportation of liquor therein was warranted on the theory that the company's officers and employees, other than the driver, knew or had full opportunity to know the nature and character of service it was furnishing. Pittsburgh Taxicab Co. v. U. S. (C. C. A. Ohio, 1922) 281 F. 669.

Where intoxicating liquors were illegally unladen from a vessel, and were transferred into a motorboat, and an officer of the state seized the liquors under a search warrant, and the United States then filed an information for forfeiture, and while it was pending forfeiture proceedings were heard in the state court, and the liquors were forfeited to the state, the United States cannot take the liquors away from the state to enforce their information, and it must be dismissed. U. S. v. Twenty-Six Cases of Intoxicating Liquors (D. C. Mass. 1923) 287 F. 540.

Liquor brought into this jurisdiction from a foreign country through enticement of federal officers, and coming into the possession of such officers as the result of an unauthorized and wrongful seizure, is not subject to the provisions of this section relating to the destruction of contraband intoxicating liquor. U. S. v. Certain Quantities of Intoxicating Liquors (D. C. N. H. 1923) 290 F. 824. It was held in that case that evidence that federal prohibition agents crossed the line to Quebec for the purpose of obtaining information with respect to transportation of liquor, and that they induced claimant's son to sell and deliver certain quantities of liquor on the American side, was insufficient to warrant a decree for the destruction of the liquor; the record being completely void of any evidence other than that the son was enticed by the officers to violate the law.

Automobiles and whisky smuggled in-

to the country without payment of duties imposed by Tariff Act 1922 (chapter 3 of Title 19, Customs Duties) could be condemned by the United States, notwithstanding Eighteenth Amendment and National Prohibition Act (incorporated in this title), prohibiting importation of intoxicating liquor, in view of provision of such Tariff Act defining merchandise to include "merchandise, the importation of which is prohibited." U. S. v. Two Automobiles and Five Cases of Whisky (D. C. Cal. 1924) 2 F.(2d) 264.

Sections 1181 and 1182 of Title 26, Internal Revenue, authorizing forfeiture of vehicles for violation of revenue laws, when considered with this section and sections 3 and 52 of this title, was held to authorize forfeiture of automobiles used in unlawful removal and concealment of intoxicating liquors on which no tax was paid. U. S. v. One Ford Automobile (D. C. Tenn. 1924) 2 F.(2d) 882.

Forfeiture of vehicle for removal of liquors with intent to defraud government of tax held not authorized for violation of National Prohibition Act (incorporated in this title). U. S. v. One Chevrolet Coupe (D. C. Mo. 1925) 9 F.(2d) 85.

Whisky obtained by permit which is not regular is forfeitable while in carrier's possession, notwithstanding good faith of claimants. Avignone v. U. S. (C. C. A. N. Y. 1926) 12 F.(2d) 509.

Motor truck admittedly used for illegal transportation was held subject to forfeiture. U. S. v. Caserta (D. C. La. 1926) 13 F.(2d) 949.

Automobile used in transporting beer imported without payment of duty is subject to forfeiture under tariff laws. Charles Zimmerman Sons Co. v. Ferguson (D. C. Mich. 1926) 16 F.(2d) 604, rehearing denied (D. C. 1927) 18 F.(2d) 125.

Under this section, automobile used in illegal transportation of whisky, without knowledge, consent, privity, or negligence of owner, was held not subject to forfeiture. U. S. v. One Chrysler 58 Touring Car (D. C. Ala. 1927) 17 F.(2d) 855.

36. —— Vessels.—In order that intoxicating liquor may have a legal status as merchandise, it must come into the United States in harmony with the provisions of the National Prohibition Act (incorporated in the title), which requires as a prerequisite a permit from the commissioner. No permit having been issued, it cannot be entered at the custom house; it is contraband the instant it comes into the United States and the vessel carrying it is subject to forfeiture under this section. The Goodhope (D. C. Wash. 1920) 268 F. 694.

A vessel which had been transferred by the United States to the United States Shipping Board, was not subject to forfeiture for transportation of intoxicating liquor within the United States, under this section, in view of Act March 9, 1920, § 1 (section 741 of Title 46, Shipping) prohibiting seizure under judicial process of a vessel owned by the United States, and section 13, expressly repealing inconsistent provisions of other acts, since the transfer of the vessel to the Shipping Board did not divest the title out of the United States. The Coldwater (D. C. Fla. 1922) 283 F. 146.

A vessel introducing liquor into the commerce of the United States by hovering off the coast and unloading into smaller craft within four leagues of land subjected herself to the jurisdiction of a United States court and may be proceeded against for forfeiture. U. S. v. 1,250 Cases of Liquor (D. C. N. Y. 1922) 283 F. 260, affirmed (C. C. A. 1923) 292 F. 486, and certiorari denied Rae v. U. S. (1923) 44 S. Ct. 38, 263 U. S. 712, 68 L. Ed. 519.

A foreign vessel, with a cargo of liquors, bound from one foreign part to another, which was forcibly seized by armed pirates, who imprisoned her officers and brought her into waters of the United States, where they unloaded a part of her cargo, was held not subject to penalties of forfeiture under the customs laws or National Prohibition Act (incorporated in this title). The Louise F. (D. C. Fla. 1923) 293 F. 933.

A British vessel, shown to have previously landed intoxicating liquors in violation of law, was held subject to seizure on the high seas and to forfeiture therefor. The Panama (D. C. Tex. 1925) 6 F.(2d) 326.

A vessel, hired by the owner to another and seized under this section, while being used by him for the illegal transportation of liquor, is not subject to forfeiture, if such use was without the knowledge, consent, or connivance of the owner. The Spray (D. C. R. I. 1925) 6 F.(2d) 414.

Treaty between United States and Great Britain (article 2, § 3), giving former power to arrest British vessels and persons thereon seeking to import liquor into United States, contemplates both proceedings against British vessels and criminal prosecutions against British nationals thereon. U. S. v. Henning (U. S. D. C. Ala. 1925) 7 F.(2d) 488, reversed on other grounds Hennings v. U. S. (C. C. A. 1926) 13 F.(2d) 74.

Rum-smuggling treaties with Great Britain and Norway are not self-executing, in sense that they extend territorial jurisdiction of laws of United States, and vessels and liquor cargo seized held not subject to forfeiture. The Sagatind (C. C. A. N. Y. 1926) 11 F.(2d) 673, modifying decree U. S. v. The Sagatind (D. C. 1925) 8 F.(2d) 788.

37. Circumstances of seizure as affecting forfeiture.—A forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession. U. S. v. Loomis (C. C. A. Wash.

1924) 297 F. 359; U. S. v. Thomas (C. C. A. Wash. 1924) 297 F. 362.

Liquor-laden motorboat, seized by city police officers and turned over to federal officers after being unloaded, was held subject to forfeiture under this section on theory that government ratified and adopted seizure by police officers. Dodge v. U. S. (R. I. 1926) 47 S. Ct. 191, 71 L. Ed. —.

The finding and seizure by a prohibition agent of an automobile standing in a private garage with liquor in it, on an illegal search without warrant, was held not to authorize forfeiture of the automobile under this section. U. S. v. Slusser (D. C. Ohio, 1921) 270 F. 818.

In the case of the seizure without process of an automobile in which whisky was being transported it is declared that "The auto and whisky, by virtue of the National Prohibition Act (41 Stat. 305) [incorporated in this title], were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have." U. S. v. Fenton (D. C. Mont. 1920) 268 F. 221.

That an automobile alleged to have been used in the illegal transportation of intoxicating liquor was seized by state officers and by them surrendered to the United States marshal did not justify a judgment for claimant thereof, on the ground that the vehicle was not offending at the time of its surrender; it being sufficient that it was offending when its owner was arrested and the vehicle seized, the regularity of the seizure not being a necessary condition to a condemnation, if there is sufficient ground for an adjudication of forfeiture. U. S. v. Story (C. C. A. Tex. 1923) 294 F. 517.

A forfeiture of an automobile cannot be declared where seizure was made by the police authorities of a city, and the fact that the police subsequently turned the car over to the federal authorities does not legalize the seizure so as to authorize a forfeiture. U. S. v. Loomis (C. C. A. Wash. 1924) 297 F. 359. The court said: "It does not appear to us that any question of concurrent power, as provided for in the second section of the Eighteenth Amendment, enters into the matter, provided, of course, we are correct in the view that the National Prohibition Act [incorporated in this section] does not confer upon the local authorities power to seize under section 26 of title 2 [this section]. We have given careful consideration to the opinion in U. S. v. Story (C. C. A. Tex. 1923) 294 F. 517, where the court held that section 26, supra, was broad enough to confer authority upon state as well as federal officers; but necessity of adherence to the rule of strict construction constrains us to hold that the police authorities were not empowered to make the seizure." See, also, U. S. v. Thomas (C. C. A. Wash. 1924) 297 F. 362.

The United States could condemn whisky smuggled into United States without payment of duties imposed by Tariff Act 1922 (chapter 3 of Title 19, Customs Duties) and without lawful permit, and automobiles containing it, though customs officer seized automobiles and whisky after seizure thereof by sheriff. U. S. v. Two Automobiles and Five Cases of Whisky (D. C. Cal. 1924) 2 F.(2d) 264.

United States could condemn automobiles and whisky smuggled into country without payment of duties imposed by Tariff Act 1922 (chapter 3 of Title 19, Customs Duties) though first seized under National Prohibition Law (incorporated in this title). Id.

Automobiles containing intoxicating liquors on which tax had not been paid, which were abandoned by occupants who were not apprehended, though not subject to forfeiture under this section, because not seized while being used in transportation, are nevertheless subject to forfeiture under sections 1181 and 1182 of Title 26, Internal Revenue. U. S. v. One Ford Automobile (D. C. Tenn. 1924) 2 F.(2d) 882.

Liquor-laden vessel, seized 34 miles off coast, was held not subject to forfeiture under this section, there being no transportation within United States. The Underwriter (C. C. A. Conn. 1926) 13 F.(2d) 433.

38. Conditions precedent.—To authorize the forfeiture of a vehicle as having been used for illegal transportation of liquors, under this section, the person in charge must previously have been arrested and convicted. U. S. v. Slusser (D. C. Ohio, 1921) 270 F. 818; U. S. v. One Cadillac Touring Car (D. C. Mich. 1921) 274 F. 470; Reo Atlanta Co. v. Stern (D. C. Ga. 1922) 279 F. 422; U. S. v. One Packard Motor Truck (D. C. Mich. 1922) 284 F. 394.

Under this section, conviction of the person in charge of a vehicle, or the master of a vessel, seized while being used for the illegal transportation of liquor, is a condition precedent to the forfeiture of the vehicle or vessel. The J. Duffy (D. C. Conn. 1926) 14 F.(2d) 426, reversed on other grounds (C. C. A. 1927) 18 F.(2d) 754.

The conviction required by this section is a conviction in a federal court of violation of this act, federal courts having,

under Judicial Code, § 256 (section 371 of Title 28, Judicial Code and Judiciary) exclusive jurisdiction of offenses cognizable under authority of the United States; so conviction in a state court of violation of state prohibition is not enough. U. S. v. One Buick Roadster (D. C. Mich. 1921) 276 F. 407.

Where liquor being transported is seized and the person in charge arrested under this section, unless such person is convicted the court is without jurisdiction to order the liquor destroyed, and where he is discharged by the commissioner and the prosecution abandoned he is entitled to a return of the liquor. Margie v. Potter (D. C. Mass. 1923) 291 F. 285.

Vehicle used in transporting liquors may be forfeited only if offender is convicted, at least as against bona fide lienor. U. S. v. One Reo Truck Automobile (C. C. A. N. Y. 1925) 9 F.(2d) 529.

A vessel used in unlawful importation of intoxicating liquor has been held not subject to forfeiture, under this section, in absence of conviction of person from whom seized. The Squanto (C. C. A. N. Y. 1926) 13 F.(2d) 548, certiorari denied Colonial Transportation Co. v. U. S. (1926) 47 S. Ct. 238, 71 L. Ed. ——.

But foreign vessel within waters of the United States and cargo were held forfeitable under section 39 of this title, even though no person in possession was convicted as required by this section. The Pesaquid (D. C. R. I. 1926) 11 F.(2d) 308.

39. Defenses in general.—Under the provisions of this section that, on conviction of a defendant of illegal transportation of liquor the court shall order the sale of the vehicle used, and seized, "unless good cause to the contrary is shown by the owner," what constitutes "good cause" rests in the discretion of the court. U. S. v. Brockley (D. C. Pa. 1920) 266 F. 1001; U. S. v. Kane (D. C. Mont. 1921) 273 F. 275. The court should be reasonably convinced, from the facts and circumstances shown, that justice will be better served by a refusal to enforce the forfeiture. U. S. v. Kane (D. C. Mont. 1921) 273 F. 275. Good cause is shown by showing that the owner of the conveyance was wholly ignorant and innocent of the illegal use thereof, and a large iron steamship, with a large crew, is not subject to sale and forfeiture because members of the crew, without the knowledge of the owners and in dereliction of their duties, have illegally transported intoxicating liquors for their individual purposes. The Saxon (D. C. S. C. 1921) 269 F. 639.

Intervener contracted to sell an automobile to defendant and others, to be paid for in monthly installments, retaining title and the right to retake possession on any default. Defendant was arrested for illegal transportation of liquor in the car, which was seized, but returned to him on giving bond. Eight months afterwards he pleaded guilty and was fined, and surrendered the car, which was ordered sold. In the meantime, intervener, though it knew the facts, and though payments were in default took no steps to retake possession of the car, and its president testified that, while he did not know of defendant's intention to use it in violation of law, he probably would have sold it if he had known, relying on the insurance. It was held that "gobd cause" for relieving the car from forfeiture was not shown. U. S. v. Kane (D. C. Mont. 1921) 273 F. 275.

While the want of knowledge on the part of an employer taxicab company, that its driver was using its car to transport intoxicating liquor, when shown to be in good faith, will constitute a good cause for the release of its car, where the facts and circumstances show that it knew or purposely avoided knowing that which it ought to have known in relation to its own business it cannot set up the plea of want of knowledge. Pittsburgh Taxicab Co. v. U. S. (C. C. A. Ohio, 1922) 281 F. 669.

The fact that the driver of a truck used in removing liquor with intent to defraud the United States of the tax due thereon has been indicted for conspiracy to violate, or for violation of the National Prohibition Act (incorporated in this title), is no defense to a suit for forfeiture of the truck, under sections 1181 and 1182 of Title 26, Internal Revenue. U. S. v. One Chevrolet Truck (D. C. Wash. 1925) 4 F. (2d) 612.

Refusal to release on bond vessel seized for illegal transportation of liquor, under this section, does not estop the government from proceeding against her for forfeiture. The G-883 (D. C. R. I. 1925) 6 F.(2d) 416.

Decision of a prohibition administrator in proceedings for revocation of a permit after seizure of property of the permittee by his agents, that there had been no violation of law, and directing return of the property, is not binding on a court, and does not prevent a libel for forfeiture by the district attorney. In re Troy Pure Food Products Co. (D. C. N. Y. 1926) 14 F.(2d) 677.

Explanation that employees mistakenly loaded illicit beer on freight car after expiration of employer's permit was held insufficient to preclude conclusion that beer was intended to be sold for use as beverage. U. S. v. Arnholt & Schaefer Brewing Co. (D. C. Pa. 1924) 15 F.(2d) 447.

40. Bar of proceedings.—Under National Prohibition Act (incorporated in this title), as amended by Act Nov. 23, 1921, § 5 (section 3 of this title), a proceeding against a vessel for illegal transportation under that act is an election, which bars a proceeding for the same act under the

customs law. The Spray (D. C. R. I. 1925) 6 F.(2d) 414.

Acquittal on prosecution for possessing and transporting intoxicating liquor in an automobile in violation of National Prohibition Act (incorporated in this title), is a bar, as determinative of the question of no unlawful transportation, to proceeding to forfeit the automobile under sections 1181 and 1182 of Title 26, Internal Revenue. National Surety Co. v. U. S. (C. C. A. Wash. 1927) 17 F.(2d) 369.

Prosecution of automobilist for transporting liquor bars subsequent proceeding to declare forfeiture of automobile for failure to pay tax. Port Gardner Inv. Co. v. U. S. (C. C. A. Wash. 1927) 17 F.(2d) 587.

Conviction for possessing liquor has been held not to bar proceedings for forfeiture of automobile for concealing therein tax-unpaid liquor to evade tax. Commercial Credit Co. v. U. S. (C. C. A. Wash. 1927) 17 F.(2d) 902.

41. Delay in bringing proceeding.—Claimant of property, seized for violation of National Prohibition Act (incorporated in this title), may, after unreasonable delay in bringing forfeiture proceeding, bring action for abandonment of seizure or return of property. Church v. Goodnough (D. C. R. I. 1926) 14 F.(2d) 432.

42. Procedure in general.—In absence of allegation in libel for forfeiture under sections 1181 and 1182 of Title 26, Internal Revenue, that vehicle was used in transporting liquor in violation of National Prohibition Act (incorporated in this title) question of cumulative remedies does not arise. U. S. v. One Ford Coupe Automobile (Ala. 1926) 47 S. Ct. 154, 71 L. Ed. ——.

Forfeiture of an automobile under this section must be in strict pursuance to the terms of the statute, and the following elements are essential: (1) That an officer of the law discover some person in the act of illegally transporting liquor in the vehicle; (2) the seizure of the liquor so transported or possessed; (3) the seizure of the vehicle and arrest of the person; (4) that the officer proceed against the person and retain the vehicle, unless redelivered to the owner on giving bond; (5) conviction of the person and order of sale of the vehicle, (6) distribution of the proceeds. U. S. v. Slusser (D. C. Ohio, 1921) 270 F. 818.

Under this section, when a person is arrested for the illegal transportation of liquor by means of an automobile, which is seized at the same time, it is not essential that an order of forfeiture or for the sale of the automobile should be made a part of the judgment of conviction of the person arrested; but such order of sale may be made in an ancillary proceeding instituted by information or libel alleging the fact of conviction, in which proceeding all liens or claims against the property may be adjudicated. U. S. v. One Stephens Automobile (D. C. Or. 1921) 272 F. 188.

"Prima facie, intoxicating liquor seized by federal agents is contraband and subject to destruction by order of the court. The presumption that it is contraband becomes conclusive upon the conviction of the owner or possessor under the provisions of section 26 [this section]. No notice or hearing is necessary to determine what disposition should be made of it. The statute is mandatory. But in the case before us no one has been convicted; therefore the liquor cannot be destroyed under the provisions of section 26." U. S. v. Certain Quantities of Intoxicating Liquors (D. C. N. H. 1923) 291 F. 717. The court quoted section 25 of the National Prohibition Act (section 39 of this title) and construed and applied it as follows:

"The words 'if it is found,' etc., imply that there must be notice and hearing before any disposition of the liquor or property seized can be disposed of by the court. An essential difference between the two sections of the statute is that under the provisions of section 25 a question of fact is left open for the determination of the court. If upon hearing it is found that the liquor was being 'unlawfully held, or possessed, or had been unlawfully used,' it is then subject to destruction or such other order as the court may make."

The remedy of forfeiture of vehicles used in unlawful transportation of intoxicating liquors afforded by this section, is not exclusive, but is cumulative of other remedies, and need not be adopted because the liquor seized with it was ordered destroyed in the criminal cause; destruction of the liquor and forfeiture of the vehicle being rights of different nature. U. S. v. Story (C. C. A. Tex. 1923) 294 F. 517.

To effect forfeiture of vessel and cargo of whisky under this section, it is necessary to plead and prove conviction of person in charge. U. S. v. The Sagatind (D. C. N. Y. 1925) 8 F.(2d) 788, affirmed, The Sagatind (C. C. A. 1926) 11 F.(2d) 673, 45 A. L. R. 1007.

Remedy of owner of ship and cargo seized under National Prohibition Act (incorporated in this title), is by suit for condemnation, and not possessory suit. The Blairmore I (C. C. A. Conn. 1925) 10 F.(2d) 35.

Procedure for forfeiture of car held in substantial compliance with this section. U. S. v. One Dodge Coupé, Tennessee License 81-976 (D. C. Tenn. 1926) 13 F.(2d) 1019.

43. Pleading.—A libel for forfeiture of a British vessel for possession of intoxicating liquor in violation of prohibition and internal revenue laws, which contained no allegation as to location of vessel, nor that distance from coast to schooner

could be traversed in one hour by vessel endeavoring to commit offense, was held insufficient. The Pictonian (D. C. N. Y. 1924) 3 F.(2d) 145.

Under Admiralty Rule 21 (set out under § 723 of Title 28, Judicial Code and Judiciary), libel for forfeiture of vessel for violation of this section, sections 1181 and 1182 of Title 26, Internal Revenue, and sections 487 and 488 of Title 19, Customs Duties, must set forth facts showing cause of action and jurisdiction to seize vessel, though seizure is made under Treaty with Norway of July 2, 1924. The Sagatind (D. C. N. Y. 1925) 4 F.(2d) 928.

Libel for forfeiture of Norwegian steamship for violation of sections 487 and 488 of Title 19, Customs Duties, this section, and sections 1181 and 1182 of Title 26, Internal Revenue, was held defective in view of treaty with Norway July 2, 1924, where the place of seizure was not definitely alleged. Id.

Government should not be permitted to reply to answer in libel in rem for forfeiture of vessel and liquors, in absence of special order. U. S. v. 2,180 Cases of Champagne (C. C. A. N. Y. 1926) 9 F.(2d) 710.

After decree for libelant against quantity of whisky is reversed, court has power in its discretion to allow libelant to challenge claimant's title by exceptive allegation. Avignone v. U. S. (C. C. A. N. Y. 1926) 12 F.(2d) 509.

In libel against quantity of whisky, libelant, by exceptive allegation to claim, may challenge claimant's title, placing burden of proof thereof on claimant. Id.

Where a libel for forfeiture of an automobile, was based on violation of the National Prohibition Act (incorporated in this title), and also of a customs law, the government may elect to proceed only under the latter charge. U. S. v. One Packard Sedan (D. C. Fla. 1926) 14 F.(2d) 874.

Libel or counts in libel for forfeiture of vessel under this section, for transporting intoxicating liquor, not alleging arrest and conviction of person in charge are defective. U. S. v. One Fageol Truck (C. C. A. Cal. 1927) 17 F.(2d) 373; The Homestead (D. C. N. Y. 1925) 7 F.(2d) 413; The Sagatind (D. C. N. Y. 1925) 4 F. (2d) 928.

44. Evidence.—The burden is on the owner of the vehicle used by another in transportation to show good cause why the vehicle should not be forfeited. U. S. v. One W. W. Shaw Automobile Taxi and 186 Quarts of Penwick Whisky (D. C. Ohio, 1921) 272 F. 491.

In proceeding for the condemnation of an automobile seized while being used for the illegal transportation of liquor, evidence that the taxi driver, who had authority to decide for the company whether to accept the employment or not, and to collect compensation therefor, knew that the liquor was being illegally transported, and that the officers of the owner corporation had information of facts indicating that the employment was an unusual one, held not to show good cause by the owner for the return of the taxi, though it had instructed its drivers not to permit liquor to be transported therein. Id.

An owner of an automobile, seized while illegally used for the transportation of liquor, does not show good cause why it should not be forfeited, unless he not only proves clearly and satisfactorily that it was used without his knowledge and consent, and in excess of any authority conferred by him on the person using it, but also removes any imputation of negligence by intrusting the vehicle to another under circumstances from which a reasonable person would have foreseen it was to be illegally used. Id.

In a proceeding to forfeit taxicab used in transportation of liquor, there was no presumption that taxicab company's business at 2 a. m. was in charge of any of its officers or managing agents superior in authority to the superintendent of its garage. Pittsburgh Taxicab Co. v. U. S. (C. C. A. Ohio, 1922) 281 F. 669.

Evidence that taxicab driver, called to saloon at 2 a. m. to take a passenger from Pittsburgh to Cleveland, was told to drive into the alley in the rear of the saloon, and after some delay, when passenger was ready to proceed, discovered that sacks filled with something had been placed in the taxicab, was sufficient to show that he knew or ought to have known that the passenger had caused intoxicating liquor to be placed in the taxicab. Id.

Evidence held not to establish good cause, under this section, why an automobile should not be forfeited for use in unlawful transportation of liquor. U. S. v. Polowy (D. C. Pa. 1923) 286 F. 297.

Automobile, sought to be forfeited, held not shown under evidence to have been used with intent to defraud United States of customs duty on smuggled whisky. National Bond & Investment Co. v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 942.

In libel to forfeit motor truck, proof that cases transported were marked "whisky," and contents smelled and looked like whisky, held prima facie sufficient, whether or not whisky analyzed by chemist was properly identified. U. S. v. One Reo Truck Automobile (C. C. A. N. Y. 1925) 9 F.(2d) 529.

Evidence obtained by seizure beyond three-mile limit of foreign ship with no manifest, held admissible in forfeiture libel. Arch v. U. S. (C. C. A. Tex. 1926) 13 F.(2d) 382.

Libel proceeding for condemnation of liquor being penal in character, no one should be visited with consequences thereof, unless illegality is satisfactorily shown. U. S. v. Robert Smith Corporation (D. C. Pa. 1924) 15 F.(2d) 448.

45. Sale of property seized.—The court, which condemned an automobile used for transporting intoxicating liquor and directed its sale, can, during the term at which the order was entered, as fixed by Act June 30, 1902, creating the district modify or vacate the order. U. S. v. Brockley (D. C. Pa. 1920) 266 F. 1001.

The prohibition officer is not authorized to sell a vehicle seized because engaged in the illegal transportation of intoxicating liquors, without a judgment of a federal court of competent jurisdiction ordering the sale of the vehicle, granted after the conviction of the person in charge of such vehicle. Chatham Motor Co. v. Griffith (1924) 157 Ga. 802, 122 S. E. 218. The court said:

" 'The following elements are essential: (1) That an officer of the law discover some person in the act of illegally transporting liquor in a vehicle. (2) The seizure of the liquor so transported or possessed. (3) The seizure of the vehicle and arrest of the person. (4) That the officer proceed against the person and retain the vehicle, unless redelivered to the owner, upon giving bond. * * * (5) Conviction of the person and order of sale of the vehicle.' U. S. v. Slusser (D. C. Ohio, 1921) 270 F. 818.

"It is not essential that an order of forfeiture or for the sale of the automobile should be made as a part of the judgment of conviction of the person arrested; but such order of sale may be made in an ancillary proceeding instituted by information or libel, alleging the fact of conviction, in which proceeding all liens or claims against the property may be adjudicated. U. S. v. One Stephens Automobile (D. C. Or. 1921) 272 F. 188. An automobile cannot be sold because of being used in the illegal transportation of intoxicating liquors before the driver transporting the liquors is convicted. U. S. v. One Cadillac Touring Car (D. C. Mich. 1921) 274 F. 470. A prerequisite of forfeiture of a vehicle used in the illegal transportation of liquors is the conviction in a federal court of the person operating the same. A conviction in a state court for the violation of state prohibition is not enough. U. S. v. One Buick Roadster (D. C. Mich. 1921) 276 F. 407. To authorize the forfeiture of a vehicle because used for illegal transportation of liquors under this section of the Volstead Act [incorporated in this title], the person in charge of the vehicle must previously have been arrested and convicted. U. S. v. One Packard Motor Truck (D. C. Mich. 1922) 284 F. 394. Unless the person in charge of the vehicle is convicted, the court is without jurisdiction to order the liquor destroyed. Margie v. Potter (D. C. Mass. 1923) 291 F. 285; U. S. v. Certain Quantities of Intoxicating Liquors (D. C. N. H. 1923) 291 F. 717. Clearly, if the court would be without jurisdiction to order the liquor destroyed, it would be without authority to declare a forfeiture of the vehicle in which it is being transported, and to order its sale.

"It appears that the prohibition officer, without the arrest and conviction of the person in charge of the automobile in question, and without any order or judgment of the court declaring the vehicle forfeited or ordering it sold, advertised and sold the same, thinking he had authority to do so under this section of the National Prohibition Act [incorporated in this title]. Under these circumstances the sale of the automobile was illegal and void, and the title of the seller thereto, under his contract retaining title until it was paid for, was not divested; and he was entitled to recover the same from the purchaser at such sale."

Where only a small amount of the purchase price of a vehicle had been paid, so that the lien of the seller, who was ignorant of the unlawful use of the automobile, is substantially equal to the value of the vehicle, and the highest bid at the marshal's sale does not equal the amount of the lien, the marshall should abandon the sale and report the facts to the court. U. S. v. Sylvester (D. C. Conn. 1921) 273 F. 253.

Where the owner of an automobile seized while being used by a conditional purchaser has established a bona fide claim against it, if in the opinion of the court it will not bring enough at a forced sale to satisfy the claim, the sale should not be ordered, but the machine restored to the owner; but if the property will probably bring more, it should be ordered sold, but on condition that no sale be made for less than the unpaid purchase price, and if a larger sum is received the owner should be paid his claim in full. Jackson v. U. S. (C. C. A. Ariz. 1924) 295 F. 620, reversing (D. C. 1923) 289 F. 127; U. S. v. Smith (D. C. Wash. 1920) 295 F. 624. In the case last cited the rule was stated as follows: "If in the opinion of the court the property will not sell for enough at forced sale to satisfy the claim of the vendor, no sale should be ordered, and the property should be restored absolutely and unconditionally to the owner. If, on the other hand, in the opinion of the court, the property will bring more than the claim of the vendor, it should be ordered sold, but upon condition that no sale should be made for less than the amount of the unpaid purchase price. If a bid for more than that amount is not forthcoming the property should be restored to the owner; if a larger amount is bid the property should be sold and the owner paid the full amount of his claim out of the purchase price without deductions of any kind. This procedure will protect the rights of all concerned and impair the rights of none."

46. Review.—Libel to forfeit automobile used to deposit or conceal liquor illicitly distilled is case at law, and should be brought before Circuit Court of Appeals by writ of error rather than by appeal; but, in view of section 861 of Title 28, Judicial Code and Judiciary, the form of remedy is unimportant. U. S. v. Garth Motor Co. (C. C. A. Ala. 1925) 4 F.(2d) 528, certiorari granted U. S. v. One Ford Coupe Automobile, No. 4,766, 501 Alabama License No. 100,978 (1925) 45 S. Ct. 640, 268 U. S. 687, 69 L. Ed. 1157, and reversed on other grounds (1926) 47 S. Ct. 154, 71 L. Ed. ——.

47. Rights of third persons—In general.—An automobile used by the owner's chauffeur for the illegal transportation of intoxicating liquor, may be subject to forfeiture on conviction of the chauffeur, even though the owner did not participate in or know of the illegal use. Lewis v. McCarthy (D. C. Mass. 1921) 274 F. 496.

Where the petition of an intervener, claiming a lien on or interest in an automobile seized while being used in the unlawful transportation of liquor, was heard on the petition, answer, and affidavits, which are in the record, a bill of exceptions is not necessary to a review. Oakland Motor Co. v. U. S. (C. C. A. Cal. 1924) 295 F. 626.

Automobile, seized while being used in transportation of liquor in attempt to defraud government of tax thereon, is subject to forfeiture, without regard to ownership, or liens or claims of third persons in respect thereto, notwithstanding National Prohibition Act (incorporated in this title), as supplemented by Act Nov. 23, 1921 (also incorporated in this title). U. S. v. One Durant Touring Car (D. C. Tex. 1924) 2 F.(2d) 478.

Where owner, part owner, or lienor of automobile knows, or has reasonable cause to believe, that it is being used, or may be used in committing crime, he may be punished by forfeiture of his property or interest therein. National Bond & Investment Co. v. Gibson (D. C. Kan. 1925) 6 F. (2d) 288, writ of error dismissed Gibson v. National Bond & Investment Co. (1927) 47 S. Ct. 471.

Where rented automobile, being unlawfully used in transportation of intoxicating liquor for beverage purposes, was abandoned, and its owner not apprehended, government was not warranted in proceeding under sections 1181 and 1182 of Title 26, Internal Revenue, thereby preventing innocent owner from reclaiming property, rather than under this section, notwithstanding sections 3 and 52 of this title. U. S. v. Milstone (1925) 6 F.(2d) 481, 55 App. D. C. 356.

Innocent owner or mortgagee of vehicle sought to be forfeited under Prohibition Act (incorporated in this title), may recover to extent of his interest. U. S. v. One Chevrolet Coupé (D. C. Mo. 1925) 9 F. (2d) 85.

Intervening petitioner, asserting ownership and seeking to prevent forfeiture of automobile under this section, must show good cause to the contrary. U. S. v. One Dodge Coupé, Tennessee License 81-976 (D. C. Tenn. 1926) 13 F.(2d) 1019.

Intervening petitioner, asserting ownership, held not to have shown good cause against forfeiture under this section, of automobile used by notorious bootlegger with her husband's permission. Id.

48. —— Conditional sellers.—It has been held that a conditional seller of an automobile truck used by the buyer for the unlawful transportation of liquor, who proves that he has a bona fide lien for a balance due on the purchase price and that he had no knowledge of the unlawful use of the automobile, is entitled to the payment of his lien out of the proceeds of the sale of the automobile. U. S. v. Sylvester (D. C. Conn. 1921) 273 F. 255.

And on seizure of an automobile while being used in the illegal transportation of liquor by the purchaser under a conditional contract of sale, and on his conviction, it has been held that his interest in the automobile is subject to forfeiture, but the interest of the seller is not if he made the sale in good faith and had no knowledge that the car was used or was to be used for illegal purposes. Oakland Motor Car Co. v. U. S. (C. C. A. Cal. 1924) 295 F. 626; Jackson v. U. S. (C. C. A. Ariz. 1924) 295 F. 620, reversing U. S. v. Bostick (D. C. 1923) 289 F. 127.

But it has also been held that a different measure of proof is required from an owner and a lienor, and an owner who, while retaining title, delivers an automobile on conditional sale, with power to use it in any way the buyer may desire, cannot escape a forfeiture, if the buyer use it unlawfully in transporting liquor, by claiming that such use was without his knowledge. U. S. v. Montgomery (D. C. Ariz. 1923) 289 F. 125, wherein it was said:

"An owner, who while retaining title in himself delivers a car on conditional sale with power to use it in any way that the buyer may desire, cannot escape a forfeiture if the buyer use it unlawfully, by claiming that such unlawful use was without his knowledge. His remedy is not against the government by reclaiming the car, but against the buyer by collecting the remainder of the purchase price. An owner may show 'good cause' if he show that the car was taken and used without his knowledge or consent; but where he turns it over to another for a price, giving absolute control to such other, he is not in a position to show 'good cause' against a forfeiture, if the car be seized while unlawfully used in the transportation of liquor, by asserting that such use was without his knowledge."

Though under Laws Or. 1923, p. 43, § 11, and this section, interest of innocent vendor of automobile, who retains title or mortgage, is not forfeited by seizure for vendee's violation, vendor's interest is not fully protected, so as to render insurance against confiscation contrary to public policy, in view of section 3 of this title, continuing all penalties for violation of laws in effect, when National Prohibition Act (incorporated in this title), was adopted. Fidelity & Deposit Co. of Maryland v. Moore (D. C. Or. 1925) 3 F.(2d) 652, appeal dismissed Moore v. Fidelity & Deposit Co. (1926) 47 S. Ct. 105, 71 L. Ed. —.

General equitable jurisdiction to abate nuisances does not include power to order sale of automobile used by buyer under conditional sale in transporting intoxicating liquors, and payment of proceeds into county treasury, as against innocent seller. People v. One 1924 Studebaker Sport Automobile (1925) 234 P. 856, 71 Cal. App. 134.

Neither Wright Act (California) nor Volstead Act (incorporated in this title), authorizes forfeiture of seller's interest in automobile sold under conditional contract of sale, and used in transportation of intoxicating liquors, for seller's lack of reasonable diligence in ascertaining use to which car is put. Id.

Forfeiture of automobile, sold under conditional contract of sale for use in transportation of intoxicating liquors, and payment of net proceeds of sale into county treasury held not authorized under Volstead Act (incorporated in this title), or Wright Act (California) as against seller, who had no knowledge of such illegal use. Id.

Proceeding to forfeit private automobile used in transporting intoxicating liquor, being one to enforce criminal penalty or judgment of sentence in criminal case, though civil process of court may be invoked, people must show, by direct or circumstantial evidence, that legal owner under conditional sale contract had actual knowledge of such use of or intent to so use such property, and fact that such owner might have so discovered by keeping car under constant espionage, without tangible or substantial reason therefor, is insufficient, especially in view of this section, made part of Wright Act (California) by reference. People v. One 1923 Oakland Sport Automobile, Model 6-44 (Cal. App. 1925) 236 P. 194; People v. One 1923 Buick Coupé Automobile, Model 23-36 (1925) 236 P. 198.

49. —— Lienors.—Claimant of a lien on an automobile, seized under this section, as having been used for illegal transportation of liquor, must establish his claim by competent evidence. U. S. v. Masters (D. C. Mo. 1920) 264 F. 250.

Judgment upholding claim of lien by innocent vendor, under this section, in proceeding to forfeit automobile used in concealing intoxicating liquor, on which internal revenue taxes had not been paid, affirmed. U. S. v. One Ford Sedan (C. C. A. Miss. 1924) 297 F. 830.

The rights of a bona fide mortgagee of a vessel seized for transportation of liquor in violation of National Prohibition Act (incorporated in this title), are protected under this section. The Maberhex (D. C. R. I. 1925) 6 F.(2d) 415.

Under section 961 of Title 46, Shipping, the rights of a mortgagee are protected on seizure of the vessel for illegal transportation of liquor in violation of National Prohibition Act (incorporated in this title), unless he authorized, consented, or conspired to effect the illegal use. Id.

Rights of judgment creditor, who has levied on alcohol, will be protected in subsequent proceeding to condemn such alcohol for guilty acts of owner, notwithstanding judgment was for money loaned to enable borrower to purchase alcohol. U. S. v. 169 Barrels of Ethyl Alcohol (D. C. Pa. 1926) 14 F.(2d) 351.

§ 41. Forfeited vessels or vehicles used for enforcement of National Prohibition Act. Any vessel or vehicle summarily forfeited to the United States for violation of the customs laws, may, in the discretion of the Secretary of the Treasury, under such regulations as he may prescribe, be taken and used for the enforcement of the provisions of this title in lieu of the sale thereof as provided by law. (Mar. 3, 1925, c. 438, § 1, 43 Stat. 1116.)

Historical Note

This section, and sections 42 and 43 of this title, were an act entitled "An act relating to the use or disposition of vessels or vehicles forfeited to the United States for violation of the customs laws or the National Prohibition Act [incorporated in this title], and for other purposes," cited in the credit to the text.

Cross-References

This section, including a portion of the original text omitted here, is also set forth in Title 19, Customs Duties, as section 522 of that title.

Notes of Decisions

See notes to section 522 of Title 19, Customs Duties.

§ 42. Application for vessel or vehicle. Upon application therefor by the Secretary of the Treasury, any vessel or vehicle forfeited to the United States by a decree of any court for violation of this title may be ordered by the court to be delivered to the Treasury Department for use in the enforcement of* the provisions of this title in lieu of the sale thereof as provided by law. (Mar. 3, 1925, c. 438, § 2, 43 Stat. 1116.)

* The omitted words "the customs laws or" should be restored.

Editorial comment.—A portion of the original text of this section is set forth in section 523 of Title 19, Customs Duties, but that section and this section, when taken together, do not seem to fully cover the provisions of the original text, without the change suggested in the starred note.

Historical Note

See the historical note to section 41 of this title.

Notes of Decisions

See notes to section 523 of Title 19, Customs Duties.

§ 43. Limitation on use; appropriations for expense of maintenance, etc., report in Budget as to vessels or vehicles; disposition when not needed for official use. Any vessel or vehicle acquired under the provisions of the two preceding sections shall be utilized only for official purposes in the enforcement of* this title. The appropriations available for enforcement of this title shall be available for the payment of expenses of maintenance, repair, and operation of said vessels and vehicles, including motor-propelled passenger-carrying vehicles. Said appropriations shall also be available for the payment of the actual costs incident to the seizure and forfeiture, and if the seizure is made under any section of law under which liens are recognized, for the payment of the amount of such lien allowed by the court. A report shall be submitted to Congress each year in the Budget, setting forth in detail a description of the vessels or vehicles so acquired, the cost of acquiring, the appraised value thereof, the uses to which they have been put, the appraised value of seizures resulting from their use, and the expense of operating such vessels or vehicles. Any vessel or vehicle so acquired when no longer needed for official use shall be disposed of in the same manner as other surplus property. (Mar. 3, 1925, c. 438, § 3, 43 Stat. 1116.)

* The omitted words "the customs laws or" should be restored.

Historical Note

See the historical note to section 41 of this title.

Cross-References

This section, including portions of the original text omitted here, is also set forth in Title 19, Customs Duties, as section 524 of that title.

Notes of Decisions

See the notes to section 524 of Title 19, Customs Duties.

§ 44. Delivery of seized liquors to United States for certain purposes. In all cases in which intoxicating liquors may be subject to be

destroyed under the provisions of this chapter the court shall have jurisdiction upon the application of the United States attorney to order them delivered to any department or agency of the United States Government for medicinal, mechanical, or scientific uses, or to order the same sold at private sale for such purposes to any person having a permit to purchase liquor the proceeds to be covered into the Treasury of the United States to the credit of miscellaneous receipts. (Oct. 28, 1919, c. 85, Title II, § 27, 41 Stat. 316.)

Historical Note

Prior to its incorporation into the Code, this section contained a further provision respecting the disposition of liquor seized and not claimed within 60 days from the date the section took effect. It was probably omitted as temporary and executed.

Notes of Decisions

1. **Free distribution of seized liquor for medical purposes.**—This section does not authorize a court to order liquor subject to destruction to be delivered to the marshal for free distribution for medicinal, etc., uses to persons unable to purchase it. The court may, however, order properly safe-guarded sales to persons having permits to purchase. In re Intoxicating Liquors (D. C. Tex. 1923) 291 F. 918.

§ 45. Powers of and protection to internal revenue officers in enforcement of chapter. The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this chapter* or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States. (Oct. 28, 1919, c. 85, Title II, § 28, 41 Stat. 316.)

* See the starred note to section 11 of this title.

Notes of Decisions

1. **Powers of officers.**—In view of this section general prohibition agent is a "civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof," within section 616 of Title 18, Criminal Code and Criminal Procedure, providing for issuance of search warrant to such an officer, notwithstanding Const. art. 2, § 2, providing for appointment of officers by the President and the Senate, the President alone, the courts of law, or the heads of departments. Steele v. U. S. (N. Y. 1925) 45 S. Ct. 417, 267 U. S. 505, 69 L. Ed. 761.

This section simply gives to the Commissioner and subordinate officers the same powers of enforcement in reference to the National Prohibition Act (incorporated in this title) as they had under existing laws relating to the manufacture and sale of intoxicating liquor. Those powers include the enforcement by distraint in cases of special taxes and certain penalties annexed to them under the internal revenue laws. But if the exactions under section 52 of this title are none of them taxes, but all of them penalties, so far as they relate to the manufacture or sale of intoxicating liquor for beverage purposes, then it follows that this section gives no power to collect these penalties by distraint. Thome v. Lynch (D. C. Minn. 1921) 269 F. 995.

Prohibition agent having reason to believe on evidence of his own senses that defendant was engaged in violation of National Prohibition Act (incorporated in this title) in his presence was authorized under section 593 of Title 18, Criminal Code and Criminal Procedure, to arrest defendant without a warrant in view of this section. U. S. v. Dalson (D. C. Mich. 1923) 288 F. 199.

In view of this section, prohibition agents had the right to enter the premises of a brewery and examine the excisable products, to determine whether there was compliance with conditions of permit, and could without a search warrant examine beer and seize it, where it contained more than one-half of 1 per cent. of alcohol. U. S. v. Westmoreland Brewing Co. (C. C. A. Pa. 1923) 294 F. 735, affirmed Westmoreland Brewing Co. v. U. S. (1923) 294 F. 740, and certiorari denied (1924) 44 S. Ct. 231, 263 U. S. 722, 68 L. Ed. 525.

Under the authority conferred by this section and section 92 of Title 26, Internal Revenue, prohibition agents may inspect in the daytime a brewery engaged

in the manufacture of a taxable product, and if their inspection discloses a product made in violation of the National Prohibition Act (incorporated in this title), they may take samples of the same without a warrant, to be preserved as evidence. Hilsinger v. U. S. (C. C. A. Ohio, 1924) 2 F. (2d) 241, affirming U. S. v. Hilsinger (D. C. 1922) 284 F. 585. Certiorari denied Hilsinger v. U. S. (1924) 45 S. Ct. 100, 266 U. S. 622, 69 L. Ed. 473.

Prohibition agents, acting under delegated authority of Commissioner of Internal Revenue, pursuant to National Prohibition Act, tit. 1, § 2 (temporary), this section and subdivision 7 of section 4 of this title, have authority to take samples for analysis of insecticide manufactured by holder of permit to use denatured alcohol. Blackman v. Mellon (D. C. N. Y. 1924) 5 F.(2d) 987.

Prohibition officer in view of this section had power to arrest defendants, engaged in manufacturing liquor, after entry through premises not occupied by defendant. Rouda v. U. S. (C. C. A. N. Y. 1926) 10 F.(2d) 916.

2. Replevin against officers.—Under this section giving to prohibition officers and agents all the protection conferred by law for the enforcement of existing laws relating to manufacture and sale of liquor, which includes section 747 of Title 26, Internal Revenue, replevin will not lie for the recovery of liquor unlawfully seized by prohibition agents without a search warrant, and a suit in equity may be maintained to compel its return. Friedman v. Yellowley (D. C. N. Y. 1923) 290 F. 248.

3. Liability of prohibition director for negligence or unauthorized acts of deputy.—A federal prohibition director is not responsible for the negligence or unauthorized acts of his deputy. Malewicki v. Qvale (C. C. A. Minn. 1924) 298 F. 801. The court said:

"A public officer as a rule is not responsible for the misfeasance, positive wrongs, negligences, etc., of subagents or servants or other persons properly employed by or under him in the discharge of his official duty. This is settled by Robertson v. Sichel (N. Y. 1888) 127 U. S. 507, 8 S. Ct. 1286, 32 L. Ed. 203. The Supreme Court there held that the government itself is not responsible for the misfeasance, wrongs, etc., of subordinate officers or agents employed in the public service and that for the same reason the 'head of a department or other superior functionary is not in a different position.' See also Dunlop v. Munroe (Dist. of Col. 1812) 7 Cranch, 242, 3 L. Ed. 329; Zinkhan v. District of Columbia (1921) 50 App. D. C. 312, 271 F. 542; Banco National Ultramarino v. Newton (D. C. N. Y. 1921) 278 F. 207. We are cited to no authority that brings the present case within the few exceptions to this rule. There are some cases holding a superior officer liable for the acts of his subordinates, but those are actions where the superior officer was sued upon his official bond, which gives rise to contract action, as distinguished from a tort, or where a statute specifically creates such liability.

"A further bar to recovery here is that the deputy whose acts are complained of was not the agent of the defendant, in the sense that would import legal liability for his acts. Section 38 of title 2 of the National Prohibition Act of October 28, 1919 [section 61 of this title] authorizes the Commissioner of Internal Revenue and the Attorney General to appoint and employ such assistants, experts, clerks, and other employees as they may deem necessary for the enforcement of the provisions of the act. Section 1 of title 2 of said act [sections 4 and 5 of this title] authorizes the commissioner, with the approval of the Secretary of the Treasury, to make such rules and regulations as are necessary for the carrying out of the act, and finally section 28, title 2, of said act [this section] provides that the commissioner and his assistants, agents, etc., shall have the power and protection in the enforcement of the act as is conferred by law for the enforcement of existing laws relating to intoxicating liquors, etc. It will thus be seen that the defendant had no right to hire or discharge those under him, and that he and his assistants are all subordinates of varying degrees under the Commissioner of Internal Revenue, located in Washington."

4. Removal of actions and prosecutions.—Prohibition agents are entitled to remove to federal court state prosecutions arising on account of acts done while searching for still. State of Maryland v. Soper (Md. 1926) 46 S. Ct. 185, 270 U. S. 9, 70 L. Ed. 449.

Federal prohibition agents have been held entitled to remove to federal court prosecution for acts performed under color of office. People of State of Illinois v. Moody (D. C. Ill. 1925) 9 F.(2d) 628.

And as this section seems to contemplate federal protection to officers acting under its authority, and as the act, while primarily a penal law, has some revenue features, it has been held that actions against a federal prohibition agent for his acts under the law will be removed from the state court where begun. In re Higgins (D. C. N. H. 1921) 273 F. 832.

But it has been held in one case that this section providing that the Commissioner of Internal Revenue, his assistants and agents, shall have all the power and protection in the enforcement of that act conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors, refers to

the power to enter distilleries, and, if admission is refused, to break in, under sections 92 and 299 of Title 26, Internal Revenue, to collect taxes by distraint, and, if needful, make repeated seizures, under section 116 of Title 26, to break up and into the ground of distillery premises, under section 300 of Title 26, to make seizures of property, under sections 61, 129, 1185 and 1193 of Title 26, and to have search warrants issued, under section 1195 of Title 26, and to the right to be protected in the exercise of such powers, and does not extend to prohibition officers and agents the right to remove suits against them given revenue officers by section 76 of Title 28, Judicial Code and Judiciary. Smith v. Gilliam (D. C. Ky. 1922) 282 F. 628.

And in Wolkin v. Gibney (D. C. N. Y. 1925) 3 F.(2d) 960, it was held that the National Prohibition Act (incorporated in this title) is not a "revenue act," and prohibition officers and agents are not "revenue officers," within section 76 of Title 28, Judicial Code and Judiciary, providing for removal to federal courts of actions brought in state court against revenue officers, notwithstanding this section.

Under section 76 of Title 28, Judicial Code and Judiciary, and this section, when prohibition officer petitions for removal to federal court of action against him on account of acts done in performance of his duty as such officer, cause is "thereupon" automatically pending in District Court without entry of specific order to that effect, and under section 80 of Title 28, Judicial Code and Judiciary, propriety of such removal cannot be determined until motion is made to remand. Hayes v. Smith (D. C. Mich. 1925) 5 F. (2d) 684.

5. Discharge on habeas corpus.—Where prohibition agent was convicted of aggravated assault in violation of Rev. St. and Codes of Porto Rico 1911, §§ 5664–5666, in municipal court of Porto Rico after shooting at automobile and occupants without knowledge of facts which would have warranted reasonably prudent man in concluding that liquor was being transported therein and was temporarily in the custody of jailer because of voluntary withdrawal of bond, pending appeal to the Supreme Court of Porto Rico, so that he might apply for writ of habeas corpus, the federal District Court did not abuse its discretion or err in holding that there was no such urgency as required agent's discharge, since authority and operations of national government would not be injuriously affected or seriously, or if at all, disturbed by reason of his confinement; the agent's remedy being appeal to Supreme Court of Porto Rico and writ of error from Supreme Court of the United States under section 344 of Title 28, Judicial Code and Judiciary, and Judicial Code, § 246, as amended by Act Jan. 28, 1915 (repealed), or removal to federal District Court under section 76 of Title 28, and section 61 of this title, and section 864 of Title 48, Territories and Insular Possessions. Pales v. Paoli (C. C. A. Porto Rico, 1925) 5 F.(2d) 280.

§ 46. Punishment for unlawful manufacture or sale of liquor or violation of permits. Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this chapter, or violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this chapter against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such

cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar. (Oct. 28, 1919, c. 85, Title II, § 29, 41 Stat. 316.)

Historical Note

Act Nov. 23, 1921, c. 134, § 4, 42 Stat. 223, provided that any person violating the provisions of that act should be subject to the penalties provided for in the National Prohibition Act. For the disposition of the sections of the Act of 1921, see the historical note to section 2 of this title.

Notes of Decisions

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See, also, notes to section 12 of this title.

I. CONSTRUCTION AND OPERATION IN GENERAL

1. Acts repealed.—See, also, notes to sections 3 and 52 of this title.

The provisions of this act, which were intended to prevent the distilling of spirits for beverage purposes, imposing on any person violating the act a penalty of fine and imprisonment, and also doubling the tax theretofore imposed by existing laws with an additional specific penalty, manifests an intention to prescribe the full penalty for unlawful distilling, and repealed section 261 of Title 26, Internal Revenue, making it an offense to defraud the United States of a tax on spirits by one carrying on the business of a distillery, in so far as it relates to distilling for beverage purposes, notwithstanding the provision of section 52 of this title that the act does not relieve any person from liability, civil or criminal, incurred under existing laws. U. S. v. Yuginovich (Or. 1921) 41 S. Ct. 551, 256 U. S. 450, 65 L. Ed. 1043, affirming U. S. v. Yuginni (D. C. 1920) 266 F. 746. This act by making dealing in liquor unlawful, by implication repealed the provisions of the internal revenue laws imposing a tax on liquor dealers, and a person who has been convicted and fined for the sale of liquor under the National Prohibition Act (incorporated in this title) cannot, in addition, be subjected to the penalties prescribed for carrying on the business of a retail liquor dealer without paying the special tax therefor. Ravitz v. Hamilton (D. C. Ky. 1921) 272 F. 721.

Section 1185 of Title 26, Internal Revenue, providing for the seizure and forfeiture of goods, merchandise, etc., found in any person's possession or control for the purpose of being sold or removed in fraud of the internal revenue laws, or with design to avoid payment of taxes, is repealed as applied to intoxicating liquors for beverage purposes by this act which provides its own machinery for preventing the manufacture and sale of such liquors. U. S. v. 2,000 Cases of Whisky, 25 Barrels of Whisky, and 253 Barrels of Wine (C. C. A. N. Y. 1921) 277 F. 410.

The provision of R. S. § 3082 (now expressly repealed), imposing a penalty for smuggling or aiding in concealing or disposing of smuggled goods, as applied to intoxicating liquors, was held superseded by this act, which prohibits the importation of such liquor, except as therein authorized, and prescribes a less severe penalty for its violation. U. S. v. Dowling (D. C. Fla. 1922) 278 F. 630. But see U. S. v. Bookbinder (D. C. Pa. 1922) 281 F. 207, holding that R. S. § 3082, was not repealed by the provisions of this act, prohibiting possession of intoxicating liquor, except as authorized by the act, but

imposing no penalty, except the general penalty of this section.

2. Offenses in general.—Unlawful possession of liquor in violation of section 12 of this title is punishable under this section. Page v. U. S. (C. C. A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S. Ct. 461, 258 U. S. 627, 66 L. Ed. 799, wherein it was said:

"It is objected that the only penalty provided in the case of unlawful possession of intoxicating liquor is the seizure of the liquor and its destruction under the provisions of section 25 of title 2 of the act [section 39 of this title]. There is no penalty either special or otherwise provided in section 3 of title 2 of the act [section 12 of this title] for the possession of intoxicating liquor, but it is made unlawful, and in section 29 of the act [this section] it is provided that—

"'Any person * * * who * * * violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for the first offense not more than $500.'

"The defendants were each fined $100 under this section of the act. The penalty was properly imposed."

This section does not, and was not intended to, cover violations of section 293 of Title 26, Internal Revenue. Bullock v. U. S. (C. C. A. Ky. 1923) 289 F. 29.

Section 35 of this title making traveling to solicit orders for liquor a nuisance, without making act misdemeanor or fixing penalty, was not intended to make act crime, but remedy by injunction provided therein is exclusive, in view of different language of section 33 of this title, and penalty provided by this section cannot be applied. U. S. v. Seibert (D. C. W. Va. 1924) 2 F.(2d) 80.

Crimes specified in this section provide their own limitations, in that they are applicable only to violations of this chapter and do not comprehend possession with intent to utter, of physician's prescriptions for liquor which is an offense under section 72 of Title 18, Criminal Code and Criminal Procedure. U. S. v. Tynan (D. C. N. Y. 1923) 6 F.(2d) 668.

3. Manufacture or sale of cider, etc.—Under this section exempting from operation of act person "manufacturing nonintoxicating cider and fruit juices exclusively for use in his home," it has been held that conviction cannot be had for manufacturing cider or fruit juices containing more than one-half of 1 per cent. of alcohol, except on showing such beverage is in fact intoxicating. Isner v. U. S. (C. C. A. W. Va. 1925) 8 F.(2d) 487.

In a prosecution under this section, for the manufacture of cider and fruit juices containing more than one-half of one per cent. of alcohol by volume, for exclusive home use, the government was held to have the burden of proving that cider and fruit juices were in fact intoxicating, notwithstanding sections 49 and 50 of this title. U. S. v. Hill (D. C. Md. 1924) 1 F. (2d) 954.

And it was held that intoxicating liquor within the provision of this section permitting manufacture of nonintoxicating cider and fruit juices is liquor which contains such a proportion of alcohol that it will produce intoxication when imbibed in such quantities as it is practically possible for a man to drink. Id.

But the Attorney General has ruled that the term "nonintoxicating cider and fruit juices" occurring in this section means cider and fruit juices containing less than one-half of 1 per cent. of alcohol. (1920) 32 Op. Atty. Gen. 353.

Under an information charging defendant with having unlawfully in his possession intoxicating liquor, to wit, 425 gallons of cider containing more than one-half of one per cent. of alcohol by volume, exclusion of evidence offered by defendant that the cider was not possessed nor used for beverage purposes, but was made from apples grown by him and possessed for the purpose of making vinegar for home use exclusively, held not error; this section being inapplicable. Hovermale v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 586.

In a prosecution under this section against a retail dealer for selling as a beverage cider containing one-half of 1 per cent. or more of alcohol, it is not a defense that defendant bought and sold the cider as preserved sweet cider, and was ignorant that it contained more than the lawful percentage of alcohol which resulted from the ineffectiveness of the preservative used by the manufacturer. U. S. v. Mathie (D. C. Cal. 1921) 274 F. 225.

4. Jurisdiction.—Under Wright Act (Cal.) adopting the provisions of this section, see People v. Brenta (1923) 220 P. 447, 64 Cal. App. 91.

5. Prosecution by information.—The offense of maintaining a nuisance, in violation of section 33 of this title and of selling liquor in violation of this section, are misdemeanors, and not "infamous crimes," and either may be prosecuted on information. Rossini v. U. S. (C. C. A. Minn. 1925) 6 F.(2d) 350.

Notwithstanding the provision of section 11 of this title, requiring United States commissioners or other officers, or courts authorized to issue warrants, to conduct the committing trial for the purpose of having offenders held for the action of a grand jury, this section and section 49 of this title, referring to affidavits, informations, or indictments clearly contemplate that prosecutions under the act may be by information as well as by indictment so that a prosecution for the first offense of selling liquor which by this section is punishable by imprisonment not exceeding six months without provision for sentence for hard labor, so

that it is a statutory misdemeanor under section 541 of Title 18, Criminal Code and Criminal Procedure, may be by information. Cleveland v. Mattingly (1923) 287 F. 948, 52 App. D. C. 374, certiorari denied (1923) 43 S. Ct. 521, 262 U. S. 744, 67 L. Ed. 1211.

6. Requisites of indictment.—See, also, notes to sections 12 and 49 of this title.

Indictments for second and subsequent offenses, see subd. III of the notes to this section.

A count in an indictment, charging that defendant did unlawfully manufacture, sell, barter, transport, deliver, furnish, and possess intoxicating liquors has been held bad as charging a number of different offenses for which different penalties are prescribed by this section. U. S. v. Cleveland (D. C. Ala. 1922) 281 F. 249.

An indictment for unlawful possession of intoxicating liquor, in violation of this section and section 12 of this title, need not negative exceptions which might have made possession lawful. Schooley v. U. S. (C. C. A. Ark. 1925) 4 F.(2d) 767.

7. Review.—Conviction under this section affirmed. McCarty v. U. S. (C. C. A. Ky. 1924) 1 F.(2d) 28; Pincolini v. U. S. (C. C. A. Nev. 1924) 295 F. 468.

8. Conviction as affecting credibility of witness.—Violations of Eighteenth Amendment of federal Constitution and National Prohibition Act (incorporated in this title) are crimes involving "moral turpitude," and record of conviction is admissible to discredit witness, if requisite imprisonment sentence might have been imposed. Kurtz v. Farrington (1926) 132 A. 540, 104 Conn. 257.

But record of conviction for violation of National Prohibition Act (incorporated in this title) is inadmissible to discredit witness, in absence of showing that offense was not first offense so that prison sentence might have been imposed. Id.

9. Collection of penalties.—Tax imposed on illegal manufacture of liquor by section 52 of this title, is not in fact a tax, but a penalty for the imposition of which evidence of violation of this section is a condition precedent, notwithstanding section 53 of this title, providing that such taxes and penalties shall be assessed and collected in same manner as other liquor taxes. Dukich v. Blair (D. C. Wash. 1925) 3 F.(2d) 302, appeal dismissed Blair v. Dukich (1926) 46 S. Ct. 469, 270 U. S. 670, 70 L. Ed. 791.

Evidence essential to assessment for illegal manufacture or sale is conviction under this section. Jasper v. Hellmich (D. C. Mo. 1925) 4 F.(2d) 852.

II. SENTENCE AND PUNISHMENT

Sentence and punishment for second and subsequent offenses, see subd. III of the notes to this section.

21. Sentence after expiration of term.—An indefinite postponement of a sentence on all but one of several counts puts it beyond the power of the trial judge to sentence on such counts at a subsequent time. Ex parte Singer (C. C. A. N. J. 1922) 284 F. 60.

22. Requisites and sufficiency of sentence.—In prosecution for violation of the National Prohibition Act (incorporated in this title) sentence of one year's imprisonment in county jail, and fine of $1,000, or in default of payment of fine that defendant be further imprisoned for a period of 6 months, has been held not in proper form, being open to misconstruction, but not prejudicial. Feigin v. U. S. (C. C. A. Cal. 1925) 3 F.(2d) 866.

In prosecution for violation of National Prohibition Act (incorporated in this title), and revenue statutes relating to intoxicating liquors, sentence of defendant to four months' imprisonment and a $500 fine was not rendered void because a penalty was not also imposed. Goorman v. U. S. (C. C. A. Mich. 1925) 6 F. (2d) 573.

Under information charging unlawful possession of liquor in second count, and maintaining liquor nuisance in third count, sentence fixing punishment at fine on second count, and six months' imprisonment and fine on third count, was held at least ambiguous as to whether imprisonment was unlawfully imposed on second count, and clause as to imprisonment was eliminated. Goode v. U. S. (C. C. A. Mo. 1926) 12 F.(2d) 742.

23. Consecutive or concurrent sentences.—Where accused was prosecuted under the National Prohibition Act (incorporated in this title), and convicted on two counts, sentence of imprisonment for six months on the first count, and six on the second, said judgments to run "consecutively," was held to mean that sentences were to be successive or succeed one another in regular order, and not to be concurrent. Rice v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 319, affirming Ex parte Rice (D. C. 1925) 6 F.(2d) 167.

24. Punishment permissible in general.—Under this section, authorizing punishment by fine or imprisonment on a first conviction for manufacturing liquor, both fine and imprisonment are not permissible. Reynolds v. U. S. (C. C. A. Tenn. 1922) 280 F. 1, judgment on rehearing (C. C. A. 1922) 282 F. 256.

Imprisonment as well as a fine is not authorized on a first conviction of the offense of carrying on the business of retail liquor dealers without paying the special tax, as the former revenue laws are repealed to the extent that a less penalty is fixed by the act. Millich v. U. S. (C. C. A. Alaska. 1922) 282 F. 604.

"What the punishment shall be, within the maximum, rests entirely in the dis-

cretion of the court." U. S. v. Siden (D. C. Minn. 1923) 293 F. 422.

Under this section conviction for unlawfully possessing intoxicating liquors supported sentence to pay fine, and in default of payment commitment to named jail. Vollmer v. U. S. (C. C. A. Tex. 1924) 2 F.(2d) 551.

Punishment for offense of possessing intoxicating liquor in Indian country, in violation of sections 241 and 244 of Title 25, Indians, is fixed by those sections, and the fixing of more severe punishment under National Prohibition Act (incorporated in this title) was error. Kennedy v. U. S. (C. C. A. Okl. 1924) 2 F.(2d) 597.

Under indictment in liquor prosecution, charging a violation of the National Prohibition Act (incorporated in this title) and sections 281 and 307 of Title 26, Internal Revenue, to which defendant pleaded guilty, sentence of defendant to four months' imprisonment and $500 fine was authorized under section 281 without aid from section 307. Goorman v. U. S. (C. C. A. Mich. 1925) 6 F.(2d) 573.

In liquor prosecution, sentence of defendant for manufacturing in violation of this section, which included both fine and imprisonment, was error. De Gregorio v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 295.

25. Imprisonment.—A defendant convicted for the first time of selling whisky in violation of this Act has been held subject to a sentence of imprisonment under this section. Dusold v. U. S. (C. C. A. Wis. 1921) 270 F. 574.

A sentence to imprisonment is not authorized on a first conviction for possessing liquor or property designed for the manufacture of liquor intended for use in violation of the act. Torrey v. U. S. (C. C. A. Miss. 1922) 278 F. 177; Troy v. U. S. (C. C. A. Ill. 1923) 288 F. 851.

One convicted of manufacturing and possessing for sale vessels, etc., designed or intended for use in the unlawful manufacture of intoxicating liquor as a first offense cannot be punished by imprisonment. Nosowitz v. U. S. (C. C. A. N. Y. 1922) 282 F. 575.

One convicted under St. Cal. 1921, p. 79, adopting penal provisions of this act, which provides for no other penalties than fines for transporting, and possessing still for manufacturing intoxicating liquor, in violation of this section and sections 12 and 39 of this title, may be imprisoned, under Penal Code Cal. § 1446, in proportion of one day's imprisonment for each dollar of fine until paid. Ex parte Garrison (D. C. Cal. 1924) 297 F. 509.

Fine for minor violation of National Prohibition Act (incorporated in this title), for which only punishment is fine, may not be enforced by imprisonment in penitentiary, in view of this section and section 33 of this title, permitting imprisonment for only one year and six months respectively for more serious offenses. Cahill v. Biddle (C. C. A. Kan. 1926) 13 F.(2d) 827.

Under this section, sentence of three months' imprisonment on conviction for unlawful sale of liquor, in violation of section 12 of this title has been held warranted. Mendez v. U. S. (C. C. A. Porto Rico, 1926) 15 F.(2d) 194, certiorari denied, Mendez v. Bingham (1927) 47 S. Ct. 344, 71 L. Ed. —.

Under Wright Act (California) which adopts penal provisions of Volstead Act (incorporated in this title), the court may impose for first offense either a fine or imprisonment, in view of this section, providing for the imposition of a fine not exceeding a certain maximum, "or" imprisonment, etc., so that for a first offense a straight jail sentence without option of paying a fine was authorized; "or" meaning one or the other of two propositions. People v. Lamb (1924) 227 P. 969, 67 Cal. App. 263.

Although, under this section, by adoption constituting part of Wright Act (California) only penalty that can be imposed on first offender for possession of intoxicating liquors is fine of not more than $500 and no sentence to imprisonment can be imposed, nevertheless under Pen. Code, § 1446, court may direct that defendant be imprisoned until fine be satisfied in proportion of one day's imprisonment for every dollar of fine. Ex parte Glavich (1925) 239 P. 708, 196 Cal. 723.

26. Power to remit fine and continue imprisonment.—Under this section punishing the first offense of illegal sale of liquor by fine or imprisonment, where one for his first offense was sentenced to pay a fine and to imprisonment, after he paid the fine to the marshal he had fully suffered the alternative punishment, and the court is without power to remit the fine and continue the imprisonment. Yavorsky v. U. S. (C. C. A. Pa. 1924) 1 F.(2d) 169. The court said: "The question here is whether or not the learned district judge could remit the fine and continue the prison sentence, after the fine had been paid to the marshal of the district, but not paid by him into the treasury of the United States, and defendant had served five days' imprisonment. In other words, had the defendant, by the payment thus made, fully suffered one of the alternative punishments to which alone the law subjected him, and, if he had, was the power of the court to punish further gone?

"Both the defendant and government rely upon the case of Ex parte Lange [(N. Y. 1873) 18 Wall. 163, 21 L. Ed. 872] supra. In that case the defendant, Lange, was indicted under Act June 8, 1872, § 290, 17 Stat. 320, for stealing, etc., mail bags. He was tried and convicted. The punish-

ment for the offense as provided by the statute was imprisonment for not more than one year or a fine of not less than $10 nor more than $200. The judge sentenced Lange to undergo imprisonment for one year and to pay a fine of $200. He was committed to jail in execution of the sentence the day it was imposed, November 3, 1873, and paid the fine the following day. On November 7th the clerk paid the fine into the treasury of the United States. The next day, November 8th, he was brought, on writ of habeas corpus, before the same judge, who entered an order vacating the former judgment, and again sentenced the prisoner to imprisonment for one year from that day. All of this was done within the same term. The prisoner sued out a writ of habeas corpus, which on hearing was discharged, and he was remanded to the custody of the marshal. An appeal was taken to the United States Supreme Court, which in the course of an elaborate opinion said: 'The petitioner, then, having paid into court the fine imposed upon him of $200, and that money having passed into the treasury of the United States, and beyond the legal control of the court, or of any one else but the Congress of the United States, and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.'

"It was doubtless on the authority of the above question that the learned District Judge entered his order of October 27th, remitting the fine before it was paid into the treasury of the United States. Does fully suffering one of the alternative punishments, to which the law subjected the defendant, depend upon whether or not the fine had been paid into the treasury of the United States by the marshal or clerk? It is admitted that the marshal is the officer to whom prisoners customarily pay fines in the district. If payment by him of a fine into the treasury of the United States is a necessary fact, within the meaning of the law, before a prisoner, who has paid his fine, can fully suffer a punishment by fine, then this present case is distinguishable from that of Ex parte Lange, and the denial of the writ of habeas corpus was justified. If it was not, and the payment was only an incident, that case is indistinguishable in principle from the one at bar and the writ of habeas corpus should have been allowed.

"While the fine had not been paid into the treasury of the United States, the defendant had completely complied with the sentence of the court with respect to the fine, and so far as he was concerned had fully suffered one of the alternative punishments, to which the law subjected him, as completely as if the money had been paid into the treasury. * * * After the fine was paid, whether the money representing it was held, during the five days defendant was in jail, by the marshal only, or by the marshal part of the time and by the clerk part of the time, or by the marshal, clerk, and the treasury of the United States, each, part of the time, was of no concern to the defendant, and had no bearing upon the suffering by him of that alternative penalty. When he had fully complied with that part of the sentence, he had as fully suffered that alternative punishment as if the fine had forthwith been deposited into the treasury of the United States by the marshal. The court was without power to remit the fine after the punishment imposed had been suffered and the writ of habeas corpus should have been allowed, and the prisoner discharged.

"The order denying the petition for the writ of habeas corpus and for the release of the prisoner is reversed, and the case is remanded to the District Court, with directions to proceed according to law."

27. Double punishment.—Conviction for sale and possession of same liquor is not imposition of double punishment. Albrecht v. U. S. (Ill. 1927) 47 S. Ct. 250, 273 U. S. 1, 71 L. Ed. —.

But where the act of possession was merely that necessarily incidental to a sale, sentences for the sale of intoxicating liquor and for the possession thereof was held to constitute a double punishment for same act. Miller v. U. S. (C. C. A. Ohio, 1924) 300 F. 529, certiorari denied (1924) 45 S. Ct. 123, 266 U. S. 624, 69 L. Ed. 474, wherein the court said:

"It is next urged that sentences for the sale and for the possession constitute a double punishment for the same act. We think this contention is sound. The act of possession relied upon was merely that possession necessarily incidental to the sale which was the basis of the sale count. We considered this subject in Reynolds v. U. S. (C. C. A. Tenn. 1922) 280 F. 1. While there may be, and commonly is, possession without sale, so that possession for a substantial time, followed by a sale, might be two distinct offenses, in this case the only possession shown was that which temporarily came to Miller for the purpose of completing by delivery the sale which he was making. The same testimony which showed the sale necessarily showed the only possession which is shown at all. It follows, as pointed out in the Reyn-

olds case, that judgment upon the sale count would bar subsequent prosecution for this act of possession, and that there should not be separate and cumulative sentences. Since the sale is plainly regarded as a more serious offense than the mere possession, we think that, for the purpose of sentence, the latter should be merged in the former. The sentence upon the possession count must therefore be set aside."

Defendant could not be punished under each of two counts, one charging the manufacture and possession of intoxicating liquors, and the other the possession of implements and materials designed for manufacture of such liquor, where the manufacture was the dominant feature of the first count, and though she did not ask that the government be required to elect, she was entitled to be relieved from punishment under the second count, on motions for a new trial and in arrest of judgment asserting double punishment. Reynolds v. U. S. (C. C. A. Tenn. 1922) 280 F. 1, modified on rehearing (C. C. A. 1922) 282 F. 256.

So conviction for illegal manufacture precludes sentence for possession of both liquor and still under separate counts. Dexter v. U. S. (C. C. A. Fla. 1926) 12 F. (2d) 777.

And as conviction of defendant on charge of manufacturing moonshine whisky necessarily embraced conviction of the offense of having in possession the same moonshine whisky, and the offense of having in possession property designed for the manufacture of moonshine whisky, charged in different counts, sentences for having in possession moonshine whisky and property designed for manufacture of whisky must be set aside, leaving sentence under count for unlawful manufacture. Morgan v. U. S. (C. C. A. W. Va. 1923) 294 F. 82.

But imposing sentence on each of several counts, for possessing utensils for manufacture and manufacturing and possessing intoxicating liquor, has been held not duplication of punishment, in view of evidence supporting each count. Palazini v. U. S. (C. C. A. R. I. 1926) 14 F. (2d) 886.

Where an indictment in one count charged conspiracy to unlawfully possess liquor, in violation of National Prohibition Act Tit. II (incorporated in this title), and in other count charged the concealment of smuggled liquor, knowing it to have been smuggled, in violation of section 497 of Title 19, Customs Duties, the court did not err in assessing separate punishments under each count, though the offenses arose out of one transaction. Powers v. U. S. (C. C. A. Tex. 1923) 294 F. 512.

Where one count alleged conspiracy to import liquor from Canada across the Detroit river into the United States at Trenton, and second count alleged transportation from river bank to another point some distance away, contention that there was double prosecution and punishment, because first count necessarily involved transportation from the boundary line to shore was held untenable. Parmenter v. U. S. (C. C. A. Mich. 1924) 2 F.(2d) 945, certiorari denied (1925) 45 S. Ct. 514, 268 U. S. 697, 69 L. Ed. 1163.

Where keeper of dance hall and saloon kept quantities of whisky and beer on hand, which from time to time were sold by his employees to frequenters of the place, such keeper and employees were held chargeable with offenses of both possession and sale of intoxicating liquor, and punishment for both offenses did not constitute double punishment. Kennedy v. U. S. (C. C. A. Nev. 1925) 4 F. (2d) 488.

Imposition of separate maximum sentences for unlawful possession for sale and selling of substances and a formula intended for use in manufacture of intoxicating liquor in violation of section 30 of this title, has been held not imposition of double punishment for one offense, on theory that possession was merged in sale. Hammerle v. U. S. (C. C. A. Ky. 1925) 6 F.(2d) 144.

Storage of liquor in three separate buildings on lot owned by defendant has been held to sufficiently support three separate indictments and sentences. Guaresimo v. U. S. (C. C. A. Mich. 1926) 13 F.(2d) 848.

A defendant may not be subjected to separate sentences for possessing and transporting the same liquor as a single transaction. Segurola v. U. S. (C. C. A. Porto Rico, 1926) 16 F.(2d) 563, certiorari granted (1927) 47 S. Ct. 587, 71 L. Ed. —.

Question of double punishment is not presented under indictments charging conspiracy to violate National Prohibition Law (incorporated in this title), and offenses against Revenue Acts applicable to manufacture. Godsey v. U. S. (C. C. A. Tenn. 1927) 17 F.(2d) 877.

28. Relief or remedy for erroneous sentence.—Where one who pleaded guilty to a first offense under the National Prohibition Act (incorporated in this title) is sentenced to pay a fine and to imprisonment, contrary to this section, after he has paid the fine, his imprisonment is illegal, and he should be discharged on habeas corpus. Yavorsky v. U. S. (C. C. A. Pa. 1924) 1 F.(2d) 169.

Error in sentence to penitentiary until payment of fine for violation of National Prohibition Act (incorporated in this title) may be corrected, and discharge from custody must be without prejudice to imposition of proper sentence. Cahill v. Biddle (C. C. A. Kan. 1926) 13 F.(2d) 827.

Question of unlawful imprisonment to

enforce payment of fine imposed at same time sentence was given for another offense may be considered in habeas corpus, although other term of imprisonment has not yet expired. Id.

Where petitioner was committed on judgment for possessing intoxicating liquors, requiring "that petitioner pay fine of $500 or be imprisoned in county jail 500 days," which was void under this section by adoption constituting part of Wright Act (California) petitioner was held not entitled to release, in view of failure to show offense was first offense, and in view of court's power to imprison in satisfaction of fine. Ex parte Glavich (Cal. 1925) 239 P. 708, 196 Cal. 723.

III. SECOND AND SUBSEQUENT OFFENSES

41. First or second offense.—Where defendants were convicted for sales of whisky on various dates under separate counts of indictment, each charging sale on particular date, each conviction should be regarded as a first offense under this section. Kennedy v. U. S. (C. C. A. Nev. 1925) 4 F.(2d) 488.

42. Grade of offense.—The second offense of selling intoxicating liquor as prohibited by the Wright Act (California) which adopts by reference the penal provisions in section 29 of the Volstead Act (this section) has been held to be a misdemeanor under the state laws. Ex parte Humphrey (Cal. App. 1923) 222 P. 366.

43. Necessity of former conviction.—Second violation of National Prohibition Act (incorporated in this title) must follow conviction of first, and third offense must follow commission and conviction of second after conviction of first. Biddle v. Thiele (C. C. A. Kan. 1926) 11 F.(2d) 235.

Under this section prescribing a greater punishment for "a second or subsequent offense." and providing that the prosecuting officer shall "plead the prior conviction," a defendant must have been convicted of a prior offense, and not merely be charged with its commission, to render evidence of such offense admissible. U. S. v. Lindquist (D. C. Wash. 1921) 285 F. 447.

44. Essentials of former conviction.—In a legal sense, a "conviction" is a judgment on a plea or verdict of guilty, and a second offense, carrying with it a more severe sentence, cannot be committed until there has been a judgment on the first; and while in common parlance a verdict of guilty is said to be a conviction, a verdict in another prosecution will not support a sentence under this section as for a second offense. Singer v. U. S. (C. C. A. N. J. 1922) 278 F. 415, certiorari denied (1922) 42 S. Ct. 272, 258 U. S. 620, 66 L. Ed. 795.

Indictment seeking to charge prior violation of this section and section 12 of this title, which alleges accused entered plea of guilty to similar charge, is wholly insufficient to allege conviction; a plea of guilty not being a "conviction," but conviction consisting of judgment on plea or verdict of guilty. Schooley v. U. S. (C. C. C. Ark. 1925) 4 F.(2d) 767.

Where record of former conviction did not disclose upon which count in indictment sentence was imposed, but showed plea of guilty to both counts, followed by general sentence, there was conviction under both counts sufficient to support allegation of former conviction. Klein v. U. S. (C. C. A. R. I. 1926) 14 F.(2d) 35.

A conviction under the Volstead Act (incorporated in this title), does not constitute a "prior conviction" warranting increased punishment for second and subsequent offenses, as provided by Wright Act (California) § 29, notwithstanding latter act adopted penal provisions of Volstead Act. People v. Pagni (1924) 230 P. 1001, 69 Cal. App. 94.

Where conviction under Volstead Act (incorporated in this title), was obtained before enactment of Wright Act (Stats. 1921, p. 79), considering such conviction in increasing defendant's punishment for subsequent violations, as provided for under Wright Act, § 29, would be imparting to Wright Act ex post facto operation, in violation of Const. U. S. art. 9, § 1, and Const. Cal. art. 1, § 16. Id.

Cal. Pen. Code, § 668, providing that persons convicted in another state of crimes punishable in this state are punishable for any subsequent crime in this state, as provided by sections 666, 667, relates only to felonies, and is not applicable to the Wright Act (California) which adopted the Volstead Act (incorporated in this title), since violations of such acts are only misdemeanors. Id.

45. Indictment or information—Prosecution by information.—A second offense of selling intoxicating liquor in violation of this section is punishable by a fine of $2,000 and imprisonment for five years, and is therefore an "infamous crime," which cannot be prosecuted by information. U. S. v. Stovall (D. C. Ariz. 1923) 289 F. 123.

In view of the fact that the National Prohibition Act (incorporated in this title) imposes more severe penalties for a second offense, the conviction and punishment of defendant in the state court for a violation of the state statute does not authorize the refusal of leave to file an information charging those acts as violations of the federal law, but the United States courts in passing sentence will take into consideration the punishment previously involved in the state courts to the end that the citizen may not be twice subjected to the full measure of punishment for the same acts. U. S. v. Holt (D. C. N. D. 1921) 270 F. 639.

46. —— Duty to plead prior conviction.—The provision of this section, that it shall be the duty of the prosecuting offi-

cer to plead prior convictions, applies to the offense of manufacturing or selling in violation of the statute, as well as the offenses for which no special penalty is prescribed, covered by the same paragraph in which the provision in question appears. Singer v. U. S. (C. C. A. N. J. 1922) 278 F. 415, certiorari denied (1922) 42 S. Ct. 272, 258 U. S. 620, 66 L. Ed. 795.

47. —— **Requisites of indictment or information.**—Under this section, prescribing punishment for a second or subsequent violation of the act, and requiring the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction before a defendant can be punished as a second or subsequent offender, the indictment or information must charge him as such second or other offender. U. S. ex rel. Manchbach v. Moore (D. C. N. Y. 1924) 2 F.(2d) 988; McCarren v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 113.

An indictment or information under National Prohibition Act (incorporated in this title), charging defendant with a second or subsequent offense, should set out plainly such charge with the facts of his prior convictions and the sentences imposed thereon. U. S. ex rel. Manchbach v. Moore (D. C. N. Y. 1924) 2 F.(2d) 988.

Indictment for subsequent offenses of possession of intoxicating liquor need not negative facts making possession lawful. Biddle v. Hays (C. C. A. Kan. 1925) 8 F. (2d) 937.

Indictment for subsequent offenses need not allege former convictions with particularity required of original charge. Id.

Indictment charging violation of National Prohibition Act (incorporated in this title) as second offense need not set forth copy of prior indictment or entire record. Chapman v. U. S. (C. C. A. Ind. 1925) 9 F.(2d) 790.

48. —— **Sufficiency of particular indictments.**—An indictment for illegal transportation held to sufficiently allege that it was for a second offense. Moseley v. U. S. (C. C. A. Tenn. 1925) 4 F.(2d) 381, certiorari denied Mosely v. U. S. (1925) 45 S. Ct. 510, 268 U. S. 690, 69 L. Ed. 1159.

Indictment for violation of this section and section 12 of this title, as felony because of successive offenses, held defective in not stating in what court former plea of guilty was entered, and in not stating facts as of record as to whether defendant was in fact found guilty and convicted of offense. Schooley v. U. S. (C. C. A. Ark. 1925) 4 F.(2d) 787.

Notwithstanding that indictment for violation of this section and section 12 of this title, was insufficient to charge previous convictions, warranting conviction of felony, punishable under section 541 of Title 18, Criminal Code and Criminal Procedure, such indictment held sufficient to charge unlawful possession of intoxicating liquor, in violation of this section. Id.

Indictment for sale of intoxicating liquor as second offense, setting out former indictment in hæc verba giving its date and date of plea of guilty, and averring that sentence was passed, held sufficient. Chapman v. U. S. (C. C. A. Ind. 1925) 9 F.(2d) 790.

Indictment for second offenses against National Prohibition Act (incorporated in this title) held sufficient. Furlong v. U. S. (C. C. A. Neb. 1926) 10 F.(2d) 492.

Indictment for third offenses against Prohibition Act (incorporated in this title) held to charge only second offenses, and sentence for third offense excessive. Biddle v. Thiele (C. C. A. Kan. 1926) 11 F.(2d) 235.

Indictment alleging plea of guilty to prior indictment held insufficient to authorize sentence as for second offense. U. S. v. Stoddart (D. C. Pa. 1926) 11 F.(2d) 827.

49. —— **Separate counts and different offenses.**—That first offense against the National Prohibition Act (incorporated in this title) is a misdemeanor, and the second offense a felony, does not preclude charging one defendant with first offense and another defendant with a second offense in separate counts of the same indictment, pursuant to this section, in view of section 557 of Title 18, Criminal Code and Criminal Procedure, independently of section 49 of this title. U. S. v. Mullen (D. C. La. 1925) 7 F.(2d) 244.

That indictment jointly charging two defendants with liquor offense, as authorized by section 557 of Title 18, Criminal Code and Criminal Procedure, and this section and section 49 of this title, charged first offense, a misdemeanor, against one defendant, and second offense, a felony, against other defendant, was held not prejudicial, where jury was cautioned that the evidence as to prior offense was to be considered only against party charged with second offense, and prior to submission of the case a verdict was directed as to the other defendant; the variation in punishment for each offense being immaterial, since jury had nothing to do with punishment. Id.

In prosecution for violation of this section, it was proper first to charge defendant with sale of intoxicating liquor on named day, and by additional count charge him with identical sale as a second offender. McCarren v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 113.

50. —— **Effect of defects.**—Petitioner held not entitled to discharge from custody because of defects of indictment for third offense not affecting jurisdiction. Biddle v. Hays (C. C. A. Kan. 1925) 8 F. (2d) 937.

51. **Evidence.**—Evidence, consisting of information theretofore filed, charging unlawful sale of liquor, and judgment that defendant was guilty of violating National Prohibition Act (incorporated in this

title), held sufficient proof of prior conviction for unlawful sale, though judgment did not specify offense. Chorak v. U. S. (C. C. A. Wash. 1926) 15 F.(2d) 945.

When an indictment charges a prior conviction under a statute providing heavier penalties for a second offense, questions of fact are presented as to the prior conviction, and the identity of accused as the same person in each prosecution, and such facts must be established at the trial. Singer v. U. S. (C. C. A. N. J. 1922) 278 F. 415, certiorari denied (1922) 42 S. Ct. 272, 258 U. S. 620, 66 L. Ed. 795.

Record of former conviction was competent evidence to prove the second offense. Harris v. U. S. (C. C. A. Tenn. 1926) 10 F.(2d) 358.

52. Proceedings at trial in general.—It was not error to permit the district attorney to read to the jury an indictment containing the allegation that the accused had been previously convicted of a similar offense. Massey v. U. S. (C. C. A. Ark. 1922) 281 F. 293.

Where defendant was charged with second offenses under this Act, he was not prejudiced by the reading of the former indictment, though it contained a count in addition to the one under which he pleaded guilty, where the government showed that such other count was nol. prossed. Krashowitz v. U. S. (C. C. A. W. Va. 1922) 282 F. 599.

In prosecution of accused as second offender under this section, manner in which issues of prior conviction and defendant's alleged identity with person convicted on previous trial, should be presented to jury is discretionary with trial judge. McCarren v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 113.

Record of former conviction to prove first offense when introduced was proof of what it recited, but court had duty of construing it and making such explanations as to its legal effect as necessary for jury to understand it. Klein v. U. S. (C. C. A. R. I. 1926) 14 F.(2d) 35.

On introduction of former indictment as proof of prior conviction, court, within its discretion, properly stated to jury what record disclosed instead of having record read to them. Id.

53. Questions for jury.—Identity of alleged second offender in liquor prosecution with person who was defendant in previous indictment, introduced to prove first offense, held for jury. Klein v. U. S. (C. C. A. R. I. 1926) 14 F.(2d) 35.

In view of this section, requiring allegation that defendant has previously been convicted of violation of act, jury should pass on prior conviction and defendant's alleged identity with accused convicted on previous trial; former conviction, not guilt, being involved. McCarren v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 113.

54. Verdict.—To authorize conviction as for second offense under this section, jury must find that defendant has previously been convicted. Klein v. U. S. (C. C. A. R. I. 1926) 14 F.(2d) 35.

55. Sentence.—In prosecution for violating National Prohibition Act (incorporated in this title) where first count charged sale of intoxicating liquor on named date and next count charged second offense, under this section, in case of conviction on both counts there can be but one sentence. McCarren v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 113.

§ 47. Privilege of witnesses; immunity from prosecution. No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpœna of any court in any suit or proceeding based upon or growing out of any alleged violation of this chapter*; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence, but no person shall be exempt from prosecution and punishment for perjury committed in so testifying. (Oct. 28, 1919, c. 85, Title II, § 30, 41 Stat. 317.)

* See the starred note to section 11 of this title.

Notes of Decisions

1. Constitutionality.—This section satisfies the constitutional guaranty against self-incrimination, and a witness cannot be excused from testifying on a claim of privilege. U. S. v. 155 Cases of Intoxicating Liquor (C. C. A. N. Y. 1924) 297 F. 411, wherein the court said:

"The purpose of section 30 of the Prohibition Act [this section] is plainly to prevent the guilty from concealing their misdoings so that enforcement of the law and punishment of at least some of the guilty may be possible. It opens the mouths of some. Statutory immunity ac-

complishes this and has due regard for the constitutional provisions as the valuable prerogative of every citizen. Congress has long been recognized as having the power to enact such statutes within the provisions of the Constitution."

2. Witness entitled to immunity in general.—Under this section, providing that no person shall be excused from testifying in any suit or proceeding for its violation on the ground that it may tend to incriminate him, but that any person so testifying shall not be subject to prosecution for or on account of any matter in relation to which he may have testified, the immunity granted is limited to witnesses called and used by the prosecution. U. S. v. Ernest (D. C. Mont. 1922) 280 F. 515.

A witness subpœnaed by the United States to testify before a United States commissioner in a proceeding pending against another person, charged with the possession of intoxicating liquors in violation of the National Prohibition Act (incorporated in this title), and who was sworn and examined as to the transaction, was immune from prosecution in such proceeding under this section. U. S. v. Ward (D. C. Wash. 1924) 295 F. 576.

One who answered questions of government agent investigating violations of National Prohibition Act (incorporated in this title), and thereafter testified in liquor prosecution of other person, without objection, was not immune from prosecution for conspiracy to violate National Prohibtion Act, under Fifth Amendment, where neither such statements nor testimony had slightest tendency to incriminate him, and were not introduced against him in such subsequent prosecution. Johnson v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 471, certiorari denied Eick v. U. S. (1925) 46 S. Ct. 101, 269 U. S. 574, 70 L. Ed. 419.

Witnesses testifying before grand jury in obedience to subpœna are entitled to benefit of this section giving them immunity from prosecution. U. S. v. Moore (D. C. Or. 1926) 15 F.(2d) 593.

Defendants, accused of conspiracy to violate National Prohibition Act (incorporated in this title), are entitled to immunity under this section, after being subpœned and testifying in case involving volations thereof, notwithstanding one overt act occurred after trial. Id.

3. Waiver of immunity.—Under this section, immunity of witnesses testifying before grand jury is not waived by their failure to claim their privilege and refusal to testify. U. S. v. Moore (D. C. Or. 1926) 15 F.(2d) 593.

Defendant voluntarily appearing before grand jury and making no objection to testifying, on ground that it would incriminate him, waives right to immunity. State v. Luquire (1926) 132 S. E. 162, 191 N. C. 479.

4. Proceedings in state courts.—While state courts should on principles of comity give full effect to this section, the admission of testimony before a federal court is immaterial as against a defendant who has voluntarily testified to the same facts in the state court. State v. Verecker (1924) 126 A. 827, 124 Me. 178.

5. Commitment for contempt.—Where questions which a witness refused to answer before a commissioner were certified to the District Court, that court with the record before it has power to commit the witness for contempt until he answers the questions. U. S. v. 155 Cases of Intoxicating Liquor (C. C. A. N. Y. 1924) 297 F. 411.

§ 48. Venue of prosecution for unlawful sale of liquor. In case of a sale of liquor where the delivery thereof was made by a common or other carrier the sale and delivery shall be deemed to be made in the county or district wherein the delivery was made by such carrier to the consignee, his agent or employee, or in the county or district wherein the sale was made, or from which the shipment was made, and prosecution for such sale or delivery may be had in any such county or district. (Oct. 28, 1919, c. 85, Title II, § 31, 41 Stat. 317.)

Notes of Decisions

1. Jurisdiction of offenses.—The officers and crew of a foreign vessel engaged in transferring liquors at sea to other vessels to be transported in United States waters in violation of law are aiders and abettors in the offense, and as such liable as principals; the court of the district into which they are brought has jurisdiction to try them. U. S. v. Ford (D. C. Cal. 1925) 3 F.(2d) 643.

§ 49. Affidavits, information, or indictments; joinder of separate offenses. In any affidavit, information, or indictment for the violation of this chapter*, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the

penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so. (Oct. 28, 1919, c. 85, Title II, § 32, 41 Stat. 317.)

* See the starred note to section 11 of this title.

Notes of Decisions

1. Constitutionality.
2. Construction in general.
3. Prosecution by information.
4. Requisites and sufficiency of indictment or information in general.
5. Alleging names of purchasers.
6. Negativing defenses.
7. —— Absence of permit.
8. Separate counts and joinder of offenses and counts.
9. —— Adding count by amendment.
10. —— Election between counts.
11. Consolidation of separate informations or indictments for trial.
12. Bill of particulars.
13. Objections to indictment.
14. Burden of proof.

See, also, notes to section 12 of this title.

1. Constitutionality.—This section has been held constitutional. Myers v. U. S. (C. C. A. Neb. 1926) 15 F.(2d) 977.

2. Construction in general.—This section is not to be whittled away until no more than declaratory of existing law. It is intended to simplify indictments. Haynes v. U. S. (C. C. A. N. Y. 1925) 4 F.(2d) 889, certiorari denied Schopp v. U. S. (1925) 45 S. Ct. 638, 268 U. S. 703, 69 L. Ed. 1166.

3. Prosecution by information.—Offenses which are not infamous, and which do not involve moral turpitude, such as violations of this act, may be prosecuted on information filed by the United States district attorney with leave of court. U. S. v. Quaritius (D. C. N. Y. 1920) 267 F. 227; U. S. v. Achen (D. C. N. Y. 1920) 267 F. 595. Although section 11 of this title authorizes the Commissioner of Internal Revenue to conduct the prosecution at the committing trial to have the offenders held for the action of a grand jury. U. S. v. Achen (D. C. N. Y. 1920) 267 F. 595.

The offense of maintaining a nuisance by selling and keeping for sale intoxicating liquors on the described premises is a misdemeanor, which may be prosecuted by information under the established law of federal jurisdiction, and in view of this section which assumes that offenses thereunder may be so prosecuted. Young v. U. S. (C. C. A. Cal. 1921) 272 F. 967.

Under section 557 of Title 18, Criminal Code and Criminal Procedure, and this section, five separate offenses against the National Prohibition Act (incorporated in this title), constituting first offenses of the defendant, could be charged in separate counts in one information, instead of by an indictment of a grand jury, though imprisonment for not to exceed six months could be imposed as punishment for each offense, notwithstanding Const. Amend. 5, requiring infamous crimes to be charged by indictment of grand jury; such offenses not constituting infamous crimes, within the Constitution, though two years' imprisonment might be imposed on the first four counts, the counts being in effect five separate informations. De Jianne v. U. S. (C. C. A. N. J. 1922) 282 F. 737.

Notwithstanding the provision of section 11 of this title, requiring United States commissioners or other officers, or courts authorized to issue warrants, to conduct the committing trial for the purpose of having offenders held for the action of a grand jury, this section and section 46 of this title, referring to affidavits, informations, or indictments clearly contemplate that prosecutions under the act may be by information as well as by indictment so that a prosecution for the first offense of selling liquor which by section 46 is punishable by imprisonment not exceeding six months without provision for sentence for hard labor, so that it is a statutory misdemeanor under section 541 of Title 18, Criminal Code and Criminal Procedure, may be by information. Cleveland v. Mattingly (1923) 287 F. 948, 52 App. D. C. 374, certiorari denied (1923) 43 S. Ct. 521, 262 U. S. 744, 67 L. Ed. 1211.

4. Requisites and sufficiency of indictment or information in general.—Under this section, providing that in an indictment it shall not be necessary to include any negative defensive allegations, but it shall be sufficient to state that the act charged was "then and there" unlawful an indictment for unlawful possession of liquor must allege the time and place. U. S. v. Cleveland (D. C. Ala. 1922) 281 F. 249.

Counts of indictment for conspiracy to violate National Prohibition Act (incor-

porated in this title) must be viewed not as framed under this section but under the conspiracy section (section 88 of Title 18, Criminal Code and Criminal Procedure). Rulovitch v. U. S. (C. C. A. N. J. 1923) 286 F. 315, certiorari denied (1923) 43 S. Ct. 434, 261 U. S. 622, 67 L. Ed. 831.

In prosecution under this act by information, the validity of the information must depend on averments of fact, comprising all the elements of the offense, but not on the conclusion of the pleader that the act complained of was prohibited and unlawful, notwithstanding the provision in this section that "it shall be sufficient to state that the act complained of was then and there prohibited and unlawful." U. S. v. Illig (D. C. Pa. 1920) 288 F. 939.

Under this section providing that it shall not be necessary in any information or indictment to include any negative averments but shall be sufficient to state that the act complained of was then and there prohibited and unlawful, an information which, with the additional circumstances necessary to inform the defendant of the nature and cause of the accusation, charges him with having unlawfully possessed intoxicating liquor at a stated time and within the jurisdiction of the court, is sufficient. Hovermale v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 586.

This section declaring it unnecessary to include "any defensive negative averments" in indictment, does not affect affirmative essential elements, and goes no further than to permit the substitution of "prohibited and unlawful" for an allegation that accused are not within exception; "negative averments" meaning those in which a negative is used. U. S. v. Eisenminger (D. C. Del. 1926) 16 F. (2d) 816.

This section sanctions a simplicity and generality of allegation that might otherwise be insufficient, eliminates necessity for reference to exceptions, limitations, and provisions found in act, and recognizes bill of particulars as a pleading supplementary to and a part of indictment or information, but, under Const. Amend. 5, bill of particulars does not cure indictment which does not charge essential elements of crime. Leonard v. U. S. (C. C. A. Tenn. 1927) 18 F.(2d) 208.

Information charging that defendant did "then and there wrongfully and unlawfully have and possess intoxicating liquor intended for use, in violation of title 2 of the National Prohibition Act" [incorporated in this title] substantially complied with requirement of this section that indictment or information state that act complained of "was then and there prohibited and unlawful." Carney v. U. S. (C. C. A. Mont. 1924) 295 F. 606.

Under this section an information charging unlawful possession of liquor in named county and district, has been held to sufficiently state the place of possession. Dukich v. U. S. (C. C. A. Wash. 1924) 296 F. 691.

Informations in language of statute held sufficient to charge offenses under this section. De Witt v. U. S. (C. C. A. Md. 1925) 7 F.(2d) 104, certiorari denied (1925) 46 S. Ct. 103, 269 U. S. 577, 70 L. Ed. 421.

In view of this section indictment held sufficiently definite as to quantity of liquor transported. Pontiff v. U. S. (C. C. A Mass. 1925) 9 F.(2d) 29.

Information charging possession held not insufficient for want of averment that possession was with intent to use unlawfully in view of this section. Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260.

5. Alleging names of purchasers.—Under provisions of this section it is unnecessary for information to set out names of persons to whom sales were made. Haussener v. U. S. (C. C. A. Neb. 1925) 4 F.(2d) 884.

Information omitting names of persons to whom sales were made would be good after verdict, without this section, authorizing the omission. Id.

Even if this section in providing that information need not set out names of persons to whom sales were made, be unconstitutional, there was no error in respect to an information omitting such allegation; it not having been attacked in the trial court. Id.

Indictment or information under the Volstead Act (incorporated in this title) is not void because of failure to state name of purchaser of liquor. Myers v. U. S. (C. C. A. Neb. 1926) 15 F.(2d) 977.

6. Negativing defenses.—Under this section and section 50 of this title, negative averments of defensive matter need not be made in information. Keen v. U. S. (C. C. A. Mo. 1926) 11 F.(2d) 260.

Under this section, it is not necessary in any indictment to include any defensive negative averment, and, even in absence of such statute, it is unnecessary to negative exceptions found in section 4 of this title. McCarren v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 113.

Thus information for sale of intoxicating liquor under National Prohibition Act (incorporated in this title) need not include any defensive negative averments. Myers v. U. S. (C. C. A. Neb. 1926) 15 F. (2d) 977.

So indictment for conspiracy to violate National Prohibition Act (incorporated in this title) need not include any defensive negative averments. U. S. v. Dwyer (D. C. N. Y. 1926) 13 F.(2d) 427.

And it has been held that an indictment for violating section 12 of this title, making it unlawful for any person to possess intoxicating liquor, except as authorized by the act, need not negative the purposes

for which accused might have possessed the liquor, but should state that the act complained of was prohibited and unlawful. Massey v. U. S. (C. C. A. Ark. 1922) 281 F. 293; Schooley v. U. S. (C. C. A. Ark. 1925) 4 F.(2d) 767. And that indictment alleging possession of liquor was prohibited and unlawful need not negative defense of lawful possession, burden of proof being on defendant. Keith v. U. S. (C. C. A. Ky. 1926) 11 F. (2d) 933. But in U. S. v. Boasberg (D. C. La. 1922) 283 F. 305, writ of error dismissed (1923) 43 S. Ct. 246, 260 U. S. 756, 67 L. Ed. 498, it was held that an indictment charging the defendant with unlawful possession of intoxicating liquor must negative the proviso, contained in section 50 of this title, that it shall not be unlawful to possess liquors in one's private dwelling for the use of himself, his family, and bona fide guests.

It is not necessary that an exception be negatived in the words of the National Prohibition Act (incorporated in this title), and other words of like import will suffice. Anderson v. U. S. (C. C. A. N. Y. 1923) 294 F. 593.

Every ingredient of crime must be charged, though defensive negative averments may be dispensed with. Aroniss v. U. S. (C. C. A. N. J. 1926) 13 F.(2d) 620.

An information charging that defendant unlawfully had a stated quantity of whisky in his possession has been held sufficient, under this section and sections 12 and 50 of this title, the burden of proving that his possession was lawful resting on defendant. Nunn v. U. S. (C. C. A. Ariz. 1925) 4 F.(2d) 380.

Indictment charging conspiracy to unlawfully possess Mexican tequila, in violation of National Prohibition Act (incorporated in this title), alleging that defendants agreed to possess 1,000 quarts of tequila, and that the agreement intended using it for beverage purposes, was held sufficient as against contention that indictment did not show that the liquor was intoxicating, or was fit for beverage purposes, or that possession was unlawful, since this section makes it unnecessary to include defensive negative averments, and since the designation of the liquor as "Mexican tequila" was descriptive merely, and added nothing to and took nothing from the averment that the liquor was intoxicating, and since the averment that the liquor was intended for beverage purposes included averment that it was suitable for such purposes. Powers v. U. S. (C. C. A. Tex. 1923) 294 F. 512.

Information which charged illegal possession of intoxicating liquor, but failed to negative the excepted uses mentioned in Volstead Act (incorporated in this title), held not to require reversal in view of Const. art. 6, § 4½, where the sole defense was an absolute denial of the possession of the liquor; no claim being made of legal possession. People v. Buttulia (1924) 233 P. 401, 70 Cal. App. 444.

7. —— Absence of permit.—That defendant's possession of intoxicating liquor was under permit is a matter of defense, and under this section, need not be negatived in information. U. S. v. Scarneos (D. C. N. Y. 1925) 8 F.(2d) 320.

Information charging unlawful transportation of intoxicating liquor as second offense, under National Prohibition Act (incorporated in this title), need not negative possession of permit to transport the liquor. Altshuler v. U. S. (C. C. A. Del. 1925) 3 F.(2d) 791.

Indictment charging conspiracy to violate section 12 of this title, through unlawful agreements to possess, sell, transport, store, and deal in intoxicating liquor, and specifying certain overt acts, held sufficient, without charging transportation to be without permit, in view of this section. Williams v. U. S. (C. C. A. Tenn. 1925) 3 F.(2d) 933.

Counts of indictment charging possession or sale of liquor were sufficient, where they alleged either that possession or sale was without a permit, or that it was for beverage purposes. Lewis v. U. S. (C. C. A. Fla. 1925) 4 F.(2d) 520.

Indictment for conspiracy to violate National Prohibition Act (incorporated in this title) is not bad for failure to allege want of permit. Weinstein v. U. S. (C. C. A. Mass. 1926) 11 F.(2d) 505, certiorari denied (1926) 47 S. Ct. 94, 71 L. Ed. ——.

8. Separate counts and joinder of offenses and counts.—Under separate counts in the same information a person may be convicted of two distinct offenses, one for transportation and the other for possession of intoxicating liquor. Bell v. U. S. (C. C. A. Tex. 1923) 285 F. 145, certiorari denied (1923) 43 S. Ct. 521, 262 U. S. 744, 67 L. Ed. 1211, wherein the court said:

"The only point urged in plaintiff in error's brief against the action of the court in assessing the fine of $500 on the count for transportation and $250 on the count for having in possession is that transportation necessarily involves possession, and that therefore a conviction for transportation involves the offense of possession. We do not think this point is well taken. A person may be in unlawful possession of intoxicating liquor for beverage purposes, and never transport or sell it, as where he has it in possession in an unlawful place. That, having it in possession unlawfully, he should afterwards transport it unlawfully, involves the commission of two unlawful acts, each violative of the National Prohibition Act [incorporated in this title] and the court on an accusation, both for unlawful possession and unlawful transportation, in

separate counts, could properly impose punishment on each count on a verdict finding the defendant guilty upon each. Massey v. U. S. (C. C. A. Ark. 1922) 281 Fed. 295."

In an indictment of a federal narcotic officer for selling and converting liquor seized by him, counts alleging, respectively, unlawful transportation and selling of the liquor otherwise than as authorized in this Act, and the illicit converting to his own use of such liquor, have been held to charge distinct offenses. Hoback v. U. S. (C. C. A. Va. 1922) 284 F. 529.

Counts alleging a conspiracy to possess, to sell, and to manufacture moonshine whisky, and counts alleging possession of an unregistered still, the carrying on of the distillery business without giving a bond, and fermenting mash fit for distillation on premises other than a distillery, were held to relate to the same acts and transactions, and to depend on substantially the same proof, and hence properly joined under section 557 of Title 18, Criminal Code and Criminal Procedure. Goodfriend v. U. S. (C. C. A. Idaho, 1923) 294 F. 148.

Indictment charging conspiracy to violate section 12 of this title, through unlawful agreements to possess, sell, transport, store, and deal in intoxicating liquor, and specifying certain overt acts, was held not invalid as charging various separate and distinct offenses in one count. Williams v. U. S. (C. C. A. Tenn. 1925) 3 F.(2d) 933.

Separate counts in an indictment for conspiracy, one charging a conspiracy to unlawfully remove spirits from a bonded warehouse, and the other the unlawful transportation of spirits from a bonded warehouse, both based on the same transaction, were held to charge but a single conspiracy. Miller v. U. S. (C. C. A. Ill. 1925) 4 F.(2d) 228, certiorari denied (1925) 45 S. Ct. 511, 268 U. S. 692, 69 L. Ed. 1160.

Where the possession of liquor charged in an indictment was the possession incident to its unlawful transportation, charged as a separate offense in another count, there cannot be conviction on both counts. Moseley v. U. S. (C. C. A. Tenn. 1925) 4 F.(2d) 381, certiorari denied Moseley v. U. S. (1925) 45 S. Ct. 510, 268 U. S. 690, 69 L. Ed. 1159.

Counts charging conspiracies, under section 88 of Title 18, Criminal Code and Criminal Procedure, to violate National Prohibition Act (incorporated in this title), and Tariff Act (chapter 3 of Title 19, Customs Duties), each count charging distinct offense belonging to same class of offenses, were held properly joined in one indictment, under section 557 of Title 18. U. S. v. Olmstead (D. C. Wash. 1925) 5 F.(2d) 712.

That indictment jointly charging two defendants with liquor offense, as authorized by section 557 of Title 18, Criminal Code and Criminal Procedure, and this section and section 46 of this title, charged first offense, a misdemeanor, against one defendant, and second offense, a felony, against other defendant, was held not prejudicial, where jury was cautioned that the evidence as to prior offense was to be considered only against party charged with second offense, and prior to submission of the case a verdict was directed as to the other defendant; the variation in punishment for each offense being immaterial, since jury had nothing to do with punishment. U. S. v. Mullen (D. C. La. 1925) 7 F.(2d) 244.

That first offense against the National Prohibition Act (incorporated in this title), is a misdemeanor, and the second offense a felony, does not preclude charging one defendant with first offense and another defendant with a second offense in separate counts of the same indictment, pursuant to section 46 of this title, in view of section 557 of Title 18, Criminal Code and Criminal Procedure, independently of this section. Id.

In prosecution for unlawfully possessing whisky and maintaining a nuisance, count for unlawful possession cannot stand, since it is included in maintaining a nuisance. Schechter v. U. S. (C. C. A. N. Y. 1925) 7 F.(2d) 881, certiorari denied (1925) 46 S. Ct. 21, 269 U. S. 561, 70 L. Ed. 412.

In prosecution for violation of National Prohibition Act (incorporated in this title), issues as to unlawful sale and second offense therein could, by appropriate instructions, be presented under single count, but court should make it clear that jury should determine issues thus raised. McCarren v. U. S. (C. C. A. Ill. 1925) 8 F.(2d) 113.

Indictment of two defendants for conspiracy to violate National Prohibition Act (incorporated in this title), and for sale and possession of intoxicating liquor, which averred that it was first offense on part of one defendant and third offense on part of the other, was held not objectionable, as improperly joining separate and distinct charges against different defendants. Filiatreau v. U. S. (C. C. A. Ky. 1926) 14 F.(2d) 659.

9. —— Adding count by amendment.— In a prosecution, originally based on a count of an information charging possession of property designed for manufacture of liquor in violation of National Prohibition Act (incorporated in this title), an order permitting the prosecution to amend the information by adding another count charging manufacture, such leave being granted when objection of defense to questions propounded by prosecution was sustained, was held not an abuse of discretion, where defendant at once pleaded not guilty to such additional

count, and did not claim surprise, nor ask for continuance, nor suggest that evidence introduced in support of count 1 was incompetent, or irrelevant to the charge alleged in second count. Walker v. U. S. (C. C. A. Cal. 1925) 7 F.(2d) 309.

10. —— Election between counts.—Under this Act, the offense of unlawful possession of intoxicating liquor is a distinct offense from that of transportation of such liquor, so that the district attorney cannot be compelled to elect as to whether he will rely for conviction on a count of the indictment charging transportation or on that charging unlawful possession. Massey v. U. S. (C. C. A. Ark. 1922) 281 F. 293.

Refusal to require government to elect between counts of indictment charging possession with intent to sell without permit and possession with intent to transport same liquor without permit has been held error, such possession constituting but one offense. Lewis v. U. S. (C. C. A. Fla. 1925) 4 F.(2d) 520.

Refusal to require government to elect between counts of indictment charging sale of intoxicating liquors without permit and same sale for beverage purposes was held error, there being but one offense. Id.

Government need not elect between prosecution for smuggling whisky and count charging illegal transportation. West v. U. S. (C. C. A. N. M. 1926) 15 F.(2d) 916.

11. Consolidation of separate informations or indictments for trial.—Where two informations were filed, one of which charged sale of intoxicating liquor, and maintenance of a place where such liquor was sold, and the other charged unlawful transportation of liquor, they were properly consolidated for trial, under section 557 of Title 18, Criminal Code and Criminal Procedure, and this section, especially where there was no verdict against the accused under the second information. Vesely v. U. S. (C. C. A. Cal. 1921) 276 F. 693, certiorari denied (1922) 42 S. Ct. 590, 259 U. S. 588, 66 L. Ed. 1077.

See, also, notes to section 557 of Title 18, Criminal Code and Criminal Procedure.

12. Bill of particulars.—Any prejudice to defendants by reason of generalities or vagueness in indictment may be overcome by bill of particulars. U. S. v. Dwyer (C. C. A. N. Y. 1926) 13 F.(2d) 427.

Libel of information against liquor seized without search warrant, alleging possession was unlawful, has been held sufficient as pleading, since claimants, if they wished more specification, might request bill of particulars under this section. Avignone v. U. S. (C. C. A. N. Y. 1926) 12 F.(2d) 509.

Accused's right to bill of particulars, stating in detail the time, place, and circumstances of alleged offense, often bars his right to complain of what would otherwise be an insufficient indictment specification of these details; hence an information charging unlawful manufacture, possession, and sale of intoxicating liquor, and maintenance of liquor nuisance, was not bad because it left blank day of month, and did not give location within county or quantities made. Leonard v. U. S. (C. C. A. Tenn. 1927) 18 F.(2d) 208.

13. Objections to indictment.—Objection that indictment was indefinite has been held cured by verdict, and could not be raised by motion in arrest of judgment. Horowitz v. U. S. (C. C. A. R. I. 1926) 10 F.(2d) 286.

Objection that indictment was indefinite could not be raised by motion in arrest of judgment, remedy being by asking bill of particulars. Id.

14. Burden of proof.—Libelant, alleging possession of liquors intended for use in violation of National Prohibition Act (incorporated in this title), or already so used, has burden of proving one of such facts in view of this section and section 50 of this title. Avignone v. U. S. (C. C. A. N. Y. 1926) 12 F.(2d) 509.

§ 50. Possession of liquor prima facie evidence of unlawful purpose; reports of possession; exception. The possession of liquors by any person not legally permitted under this chapter to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this chapter. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such

liquor was lawfully acquired, possessed, and used. (Oct. 28, 1919, c. 85, Title II, § 33, 41 Stat. 317.)

Historical Note

Prior to its incorporation into the Code, this section contained a further provision requiring persons legally permitted to have liquor to report to the Commissioner within ten days after the date when the Eighteenth Amendment went into effect the kind and amount of intoxicating liquors in their possession. It was evidently omitted as temporary and obsolete.

Notes of Decisions

1. Constitutionality.
2. Time of taking effect of section.
3. State legislation.
4. Possession as offense.
5. Transportation to residence.
6. Rights in liquor possessed.
7. Search and seizure.
8. Right to reclaim liquors.
9. Indictment.
10. Burden of proof in general.
11. Possession as prima facie evidence.
12. Admissibility of evidence.
13. Sufficiency of evidence.
14. Instructions.
15. Harmless error.

See, also, notes to section 12 of this title.

1. Constitutionality.—The restriction by this section, of possession of intoxicating liquors for personal consumption to such possession within private homes, is a valid exercise of power to enforce the prohibition of transportation of intoxicating liquor, given by the Eighteenth Amendment, § 2. Street v. Lincoln Safe Deposit Co. (D. C. N. Y. 1920) 267 F. 706, reversed on other grounds (1920) 41 S. Ct. 31, 254 U. S. 88, 65 L. Ed. 151, 10 A. L. R. 1548.

Const. U. S. Amend. 18, confers on Congress power to make possession of intoxicating liquors for beverage purposes a criminal offense, as was done by this section and sections 12 and 39 of this title. Riggs v. U. S. (C. C. A. W. Va. 1926) 14 F.(2d) 5, certiorari denied (1926) 47 S. Ct. 110, 71 L. Ed. —.

"Congress in the exercise of its power has determined that it is essential and appropriate to the enforcement of this constitutional amendment to restrict the possession of intoxicating liquors to those having permits to keep and possess the same and to private homes when intended for the sole use of the owner and his family and their bona fide guests. The possession of intoxicating liquors is the first essential to its barter and sale as a beverage. Intoxicating liquors, stored in the same building in which the owner or occupant of the building is conducting a business with the public generally, not only furnishes opportunities for the violation of the provisions of this constitutional amendment, but would also tend to hinder, delay, and prevent the detection of unlawful traffic therein. It would therefore appear that this provision of the National Prohibition Act [incorporated in this title] has a substantial relation to the enforcement of national prohibition, and that Congress has not in this respect transcended its power or abused the discretion conferred upon it by the second section of the Eighteenth Amendment." Rose v. U. S. (C. C. A. Ohio, 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed. 419.

2. Time of taking effect of section.—This section took effect on January 17, 1920, the day after the constitutional amendment took effect, so that an indictment charging violation January 16, 1920, must be quashed. Zimmerman v. U. S. (C. C. A. Ill. 1921) 277 F. 965.

3. State legislation.—This section prescribing a rule of evidence, was not adopted by the Wright Act (California) which adopted only the penal provisions of the Volstead Act (incorporated in this title), and instruction in language thereof should not have been given. People v. Silva (1924) 227 P. 976, 69 Cal. App. 351. To the same effect, see People v. Pagni (1924) 230 P. 1001, 70 Cal. App. 94.

Rem. Code Wash. 1915, § 6262—22, as amended by Laws 1917, pp. 60, 61, §§ 11, 15, making it unlawful for a person to have in his possession more than a specified amount of intoxicating liquor has been held valid, in so far as it prohibits the possession of liquor outside of one's dwelling, as against contention that it was in conflict with this section, providing that it shall not be unlawful to possess liquors in one's private dwelling. State v. Gibbons (1922) 203 P. 390, 118 Wash. 171.

"In so far as the Volstead Act [incorporated in this title] permits possession by a person in his private dwelling only for family purposes, it confers a privilege to so possess and an immunity from penalties for such possession when lawfully acquired, and not connected with unlawful purposes, which the Fourteenth Amendment protects from abridgment by the state law as to citizens of the United States; and the equal protection of the laws provision of the Fourteenth Amendment renders inoperative as to all persons the provisions of the state law penalizing the possession by a person in his bona fide residence, for family purposes, intoxicating liquors in excess of four quarts,

etc." Haile v. Gardner (1922) 82 Fla. 355, 91 So. 376; Hall v. Moran (1921) 81 Fla. 706, 89 So. 104.

4. Possession as offense.—Section 39 of this title, making it unlawful to possess liquor intended for use in violating that act, does not make unlawful possession in a storage warehouse by one who intends to use the liquor in his own home for his family and guests, which is permitted by this section. Street v. Lincoln Safe Deposit Co. (N. Y. 1920) 41 S. Ct. 31, 254 U. S. 88, 65 L. Ed. 151, 10 A. L. R. 1548, reversing (D. C. 1920) 267 F. 706.

Under this section, which permits the possession of liquor lawfully acquired before the Eighteenth Amendment took effect for the personal use of the owner and his family and guests, and provides that the possession of liquors by any person not legally permitted to possess it shall be prima facie evidence that it is kept for sale, an owner of liquor lawfully acquired before the amendment became effective might store it in a storage warehouse, and thereafter remove it from the warehouse to his own home, for the personal use of himself, his family, and his guests. Id.

This section makes the possession of liquor in one's private dwelling for personal use lawful, though the dwelling is used in part for business purposes, unless the possessor is the person using it for business purposes. Hence a wife's possession is lawful, though her husband is conducting a saloon in part of the premises. U. S. v. Crossen (D. C. Pa. 1920) 264 F. 459.

The liberal construction enjoined by section 12 of this title, does not justify the court in extending the prohibitive provisions of the act beyond what is plainly stated, nor in omitting language which would change its plain meaning. Hence the provision in this section that "it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied, and used by him as his dwelling only" cannot be made to read "it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used as a dwelling only." Id.

Where liquor purchased in February, 1919, was not in the private dwelling of the purchaser at the time when the Eighteenth Amendment went into effect, and he failed to report the possession of the liquor to the commissioner within ten days thereafter, his possession thereafter was without authority of law, and he may not invoke the aid of a court of equity to obtain the transfer of the liquors from a bonded warehouse. Fitzhugh v. Mitchell (D. C. Cal. 1922) 277 F. 966.

This section does not make the mere possession of intoxicating liquor a crime, nor would a law making possession a crime be within the power conferred on Congress to legislate for the enforcement of the Eighteenth Amendment, unless for the purpose of rendering effective the prohibition of manufacture, sale, transportation, importation, or exportation contained in the amendment, and appropriate to that end. U. S. v. Dowling (D. C. Fla. 1922) 278 F. 630.

Possession of beer found on brewery premises after revocation of dealcoholizing permit was unlawful, and in itself constituted a common nuisance, in violation of section 33 of this title, and also violated section 12 of this title in view of this section, so as to authorize destruction of manufacturing equipment found on premises. U. S. v. Auto City Brewing Co. (D. C. Mich. 1925) 5 F.(2d) 362.

Possession of intoxicating liquor except with intent to violate law, is not unlawful in view of this section. Petition of Shoemaker (D. C. Pa. 1925) 9 F.(2d) 170.

5. Transportation to residence.—See, also, annotation under section 12 of this title.

Under section 12 of this title, prohibiting the transportation of intoxicating liquor for beverage purposes, except as therein authorized, and providing that this chapter shall be liberally construed to prevent the use of intoxicating liquor as a beverage, intoxicating liquor cannot be transported from a bonded warehouse to the owner's residence, notwithstanding section 39 of this title, prohibiting warrants to search private dwellings and this section declaring it not unlawful to possess liquors in one's private dwelling for the personal consumption of the owner, his family, and bona fide guests, and the proviso of section 12, permitting the purchase and sale of warehouse receipts for liquors in bonded warehouses, as a bonded warehouse cannot be regarded as a mere convenience contributory to the dwelling. Corneli v. Moore (Mo. 1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332, affirming (D. C. 1920) 267 F. 456.

6. Rights in liquor possessed.—One who lawfully acquired 17 cases of intoxicating liquors and stored them in a public warehouse on about July 2, 1919, was entitled to have such liquor protected after passage of this Act, notwithstanding the provision in this section that possession of liquor should be prima facie evidence that it was kept for purpose of being sold, and such liquor constituted property the value of which could be recovered where warehouse failed to deliver on demand, notwithstanding that a permit was not shown to warehouseman on demand for the liquor. Murphy v. St. Joseph Transfer Co. (Mo. App. 1921) 235 S. W. 138.

7. Search and seizure.—See notes to section 39 of this title and section 611 et seq.

of Title 18, Criminal Code and Criminal Procedure.

That this section places the burden of proving that possession of liquor was lawful on the possessor does not deprive him of the right to protection against unlawful search and seizure. U. S. v. Dossi (D. C. N. Y. 1926) 12 F.(2d) 956.

In view of this section owner held entitled to return of intoxicating liquor seized through unlawful search and seizure. Petition of Shoemaker (D. C. Pa. 1925) 9 F.(2d) 170.

Intoxicating liquors, neither reported nor contained in the owner's private dwelling, but in a place of business open to the public, were prima facie subject to seizure. O'Connor v. U. S. (D. C. N. J. 1922) 281 F. 396.

8. Right to reclaim liquors.—Since this section does not make possession of liquor in a private dwelling for personal consumption only unlawful, and thereby permits possession for some purposes, the provision of section 39 of this title, requiring liquor unlawfully held or possessed to be destroyed unless the courts shall otherwise order, does not prevent the return of liquor unlawfully seized to the person from whom it was seized, and who claimed he had stored it for his own use. U. S. v. Mattingly (1922) 285 F. 922, 52 App. D. C. 188.

In view of this section and section 39 of this title, petition for return of liquor unlawfully seized will be denied unless petition affirmatively shows that petitioner is legally permitted to have possession of the liquor. U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963.

Despite this section, intoxicating liquors seized in near-beer saloon under an illegal search warrant will be returned to proprietor, though criminal proceedings against him have been terminated, where the only evidence that the liquor was contraband when seized, and will be, if returned, unlawfully possessed, under sections 12 and 39 of this title, is that illegally obtained in violation of Const. Amend. 4. Geraghty v. Potter (D. C. Mass. 1925) 5 F.(2d) 366, remanded with directions to vacate judgment Potter v. Geraghty (1926) 47 S. Ct. 235, 71 L. Ed. ——.

Under the provisions of this section, that the possession of liquor by one not legally permitted shall be prima facie evidence that it is being kept for the purpose of disposition in violation of this chapter, and section 39 of this title, that no property rights shall exist in liquor so kept, the unlawful owner may not reclaim the liquors by virtue of his title, but must succeed, if at all, because of the violation of his possession. Gallagher v. U. S. (C. C. A. N. Y. 1926) 6 F.(2d) 758.

9. Indictment.—It has been held that an indictment for possessing liquor for beverage purposes, is insufficient, unless it negatives the exception in this section, by alleging that the liquor was not possessed by defendant in his private dwelling occupied by him for his personal use and consumption. U. S. v. Boasberg (D. C. La. 1922) 283 F. 305, dismissed (1923) 43 S. Ct. 240, 260 U. S. 756, 67 L. Ed. 498; U. S. v. Cleveland (D. C. Ala. 1922) 281 F. 249.

But, in another case, it was held that an indictment alleging possession of liquor was prohibited and unlawful need not negative defense of lawful possession, burden of proof being on defendant. Keith v. U. S. (C. C. A. Ky. 1926) 11 F.(2d) 933.

Indictment for conspiracy to possess liquor held sufficient. Hilt v. U. S. (C. C. A. Fla. 1926) 12 F.(2d) 504.

10. Burden of proof in general.—One who has become legally possessed of intoxicants may keep them in his dwelling. He may obtain a permit for them, but he is not required to do so; but if the rightfulness of his having them is legally challenged, the burden is on him to show that he lawfully obtained, keeps and uses them. There is nothing harsh or oppressive in such construction. He always knows how he procured the liquor, and frequently no one else does. Singleton v. U. S. (C. C. A. S. C. 1923) 290 F. 130.

A criminal prosecution has been held an "action," within this section placing the burden on the possessor of liquor "in any action concerning it" of proving that the liquor was lawfully acquired, possessed, and used. Mason v. U. S. (C. C. A. Ill. 1924) 1 F.(2d) 279, certiorari denied (1924) 45 S. Ct. 97, 266 U. S. 611, 69 L. Ed. 467.

But in another case, it was held that the provision of this section "the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used," applies to civil actions, and not to criminal prosecutions. U. S. v. Cleveland (D. C. Ala. 1922) 281 F. 249.

Under this section it has been held that an applicant for an order for the return of liquor unlawfully seized is required to show that it was lawfully possessed or acquired. U. S. v. Jensen (D. C. N. Y. 1923) 291 F. 668. The court pointed out that there was a conflict among the courts on the question at issue and reviewed the cases as follows:

"It has frequently been determined that as a general rule mere possession gives a right against any one who unlawfully disturbs the same. Of cases recognizing this rule Tapscott v. Cobbs (1854) 11 Grat. (Va.) 172, and Anderson v. Gouldberg (1892) 51 Minn. 294, 53 N. W. 636, are typical. Neither had to deal with facts similar to the case at bar, where a statute has raised a presumption that possession is illegal. It is, of course, quite impossible to harmonize the decisions. It is urged by the government that the commissioner's order, directing the return of the

liquor, is not binding upon this court—citing U. S. v. Maresca (D. C. N. Y. 1920) 266 F. 713. That case was not followed in U. S. v. Casino (D. C. N. Y. 1923) 286 F. 976 (under the authority of Todd v. U. S. [Ala. 1895] 158 U. S. 278, 15 S. Ct. 889, 39 L. Ed. 982), where the court ordered a return when there was a mere allegation of ownership. Decisions of the United States District Court for the Eastern District of Massachusetts, which have come to my attention—U. S. v. Sievers (D. C. Mass. 1923) 292 F. 394; U. S. v. 26 Cases of Intoxicating Liquors (D. C. Mass. 1923) 287 F. 540; Keefe v. Clark (D. C. Mass. 1923) 287 F. 372; U. S. v. Vigneaux (D. C. Mass. 1923) 288 F. 977; U. S. v. A. Quantity of Intoxicating Liquors (D. C. Mass. 1923) 289 F. 278—indicate that in that district the court will order a return under the facts of the case at bar. A reported decision in Godat v. McCarthy et al. (D. C. Mass. 1922) 283 F. 689, is to the same effect. The holding in U. S. v. Kaplan (D. C. Ga. 1923) 286 F. 963, is, however, directly contra.

"Three cases, decided in this district, have been cited by petitioner, and may justify comment. U. S. v. Porazzo (D. C. N. Y. 1921) 272 F. 276, decided March 8, 1921, ordered the return of whisky, but the question now to be determined does not seem to have been presented. U. S. v. Speranzino (no written opinion filed), decided February 26, 1921, merely decided that, when the government once consents to the entry of an order, it cannot later have such order vacated and set aside, even though the order in question has directed the return of property to one not entitled thereto. U. S. v. Quaritius (D. C. N. Y. 1920) 267 F. 227, decided that under the circumstances there disclosed the government had no right to file an information. The case did not determine what must be alleged by an applicant who seeks the return to him of liquor illegally seized.

"It is earnestly to be hoped that this decision will be reviewed and the law settled, at least so far as this circuit is concerned. Inasmuch as the various authorities cannot be reconciled, I shall merely state my conclusion that section 33, supra [this section] requires an applicant for an order directing the return of liquor to show that it was lawfully possessed or acquired."

By this section the burden is put on the possessor to show that liquor was lawfully acquired, possessed and used. U. S. v. Vatune (D. C. Cal. 1923) 292 F. 497. In this case the search was made of an automobile. The court said:

"If, therefore, in any proceeding, or pursuant to any form of legal redress, the claimant of liquor can successfully meet this burden of proof, and show by a preponderance of the evidence that it was in his lawful ownership, custody, or possession, then he may effect its return; otherwise, being outlawed by the law of the land, it will be destroyed, or subjected to such other disposition as the court, pursuant to the provisions of section 25 of the National Prohibition Act [section 39 of this title] shall prescribe."

But upon an application for the return of liquors unlawfully seized in a private dwelling, it has been held that there rests upon the petitioner no burden of alleging and proving that such liquor was lawfully acquired and possessed. U. S. v. Descy (D. C. R. I. 1922) 284 F. 724, wherein the court said:

"It is apparent, of course, that upon the trial of the information the burden of proof of unlawful possession rests upon the United States, and is not to be sustained merely by proof of the finding of intoxicating liquors in the plaintiff's private dwelling. As there is no requirement that this liquor shall be reported, or that a permit be secured, no presumption can arise against the possessor from the fact of possession alone."

Compare U. S. v. Vigneaux (D. C. Mass. 1923) 288 F. 977, wherein it was held that where intoxicating liquor was taken from a private dwelling under an illegal search warrant, the owner thereof was entitled to return of the same, and he was not required to assume the burden of proving that his possession of the liquor was lawful.

A proceeding for forfeiture of liquor unlawfully seized from a private dwelling is not an "action concerning the same," within the meaning of this section, and the claimant from whom it was seized is not required to prove the lawfulness of his possession, to be entitled to its return. U. S. v. A Quantity of Intoxicating Liquors (D. C. Mass. 1923) 289 F. 278, wherein it was said:

"The possession of liquors in a private residence is as consistent with innocence as with guilt under the statute. To hold that officers may invade such residence, illegally seize liquors, and compel the householder to assume the burden of proving his possession not unlawful before redress can be given for the abuse of process, is not consistent with our ideas of the constitutional rights of a citizen, nor is there authority for such a proposition."

Libelant, alleging possession of liquors intended for use in violation of National Prohibition Act (incorporated in this title) or already so used, had burden of proving one of such facts. And claimant did not have burden of proving that whisky was obtained under valid permit. Avignone v. U. S. (C. C. A. N. Y. 1926) 12 F.(2d) 509.

11. Possession as prima facie evidence.—Possession of intoxicating liquor illegally acquired is prima face evidence that it is kept for sale, in view of this section.

Filippelli v. U. S. (C. C. A. Cal. 1925) 6 F.(2d) 121.

Under this section, possession of liquor is prima facie unlawful, and the burden rests on the possessor to show its lawfulness. Feinberg v. U. S. (C. C. A. Colo. 1924) 2 F.(2d) 955.

Under this section, where possession of liquor on premises involved in abatement proceedings under section 34 of this title is established, there arises presumption of intent to sell, though there may be no proof of sales. Denapolis v. U. S. (C. C. A. La. 1925) 3 F.(2d) 722.

This section making possession of liquor prima facie evidence of unlawful purpose, has no application in a trial for conspiracy under section 88 of Title 18, Criminal Code and Criminal Procedure, and an instruction quoting such section, and giving no other charge as to burden of proof, constitutes reversible error. Linden v. U. S. (C. C. A. N. J. 1924) 2 F. (2d) 817.

Where the defendant did not deny the unlawful possession of whisky, or attempt to show that it was for personal use only, the presumption created by this section is sufficient to sustain a finding that the liquor was kept for the purpose of being sold, bartered, or exchanged in violation of the act, and such presumption is sufficient to show guilt of maintaining a nuisance under section 33 of this title. Barker v. U. S. (C. C. A. W. Va. 1923) 289 F. 249.

Evidence held to support a finding that the basement of defendant's dwelling in which he resided was used for business purposes and was lawfully searched under a search warrant and possession of liquor found and seized therein held prima facie evidence that it was kept for the purpose of sale under this section. Forni v. U. S. (C. C. A. Cal. 1925) 3 F.(2d) 354.

It is not the law in California that the possession of liquors is prima facie evidence that the liquor was kept to be sold, etc., and that the burden of proof is upon accused to prove he lawfully acquired, possessed, and used such liquor; the Wright Act (California) having adopted only the penalties of the Volstead Act (incorporated in this title) and instruction to that effect was improper, especially where the prosecution presented merely a question of sale. People v. Mattos (1924) 227 P. 974, 67 Cal. App. 346.

Evidence, which included finding of a few flasks of whisky and a number of bottles of beer on leased premises, has been held not to authorize tenant's removal, under New York Civil Practice Act, § 1410, subd. 5, on ground that he was conducting an illegal business, notwithstanding this section, making possession of liquor prima facie evidence of a violation of that act. Florgus Realty Corporation v. Reynolds (1924) 204 N. Y. S. 303, 123 Misc. Rep. 161.

12. Admissibility of evidence.—A spontaneous statement by persons arrested with whisky in their possession, disclaiming ownership and claiming possession to be innocent, is admissible in their defense as part of the res gestæ. Stroud v. U. S. (C. C. A. Tenn. 1924) 2 F.(2d) 660.

13. Sufficiency of evidence.—Evidence of a statement by defendant that he was going to load a quantity of liquor, then in his private dwelling on a truck standing by the cellar window held in view of this section to warrant filing of an information charging unlawful possession. U. S. v. Bonner (D. C. Pa. 1923) 285 F. 393.

Evidence held sufficient in view of this section to sustain conviction for possession of liquor in violation of section 12 of this title. Fassolla v. U. S. (C. C. A. Cal. 1922) 285 F. 378.

Evidence held to show lawful possession of liquor seized under defective warrant as affecting right to return. Dickhart v. U. S. (1926) 16 F.(2d) 345, —— App. D. C. ——.

14. Instructions.—Where liquor was found in possession of a defendant in his hotel, an instruction that the burden was on him to prove that it was possessed lawfully by him for his own use held not erroneous. Dillon v. U. S. (C. C. A. N. Y. 1921) 279 F. 639.

Requested instruction as to defendant's right to possess intoxicating liquor in private residence for personal use held properly refused, as assuming that liquor unlawfully manufactured or acquired might be so lawfully possessed. Filippelli v. U. S. (C. C. A. Cal. 1925) 6 F.(2d) 121.

15. Harmless error.—Where defendant admitted the ownership and possession of liquor seized on his premises and the only issue was as to whether it was kept for illegal purposes, and the prima facie case made under this section by its possession was not met, the admission of evidence of previous arrests of defendant, if erroneous, was not prejudicial. Forni v. U. S. (C. C. A. Cal. 1925) 3 F.(2d) 354.

In prosecution for possession of intoxicating liquor under this section, error in admitting testimony of finding of liquor on defendant's premises prior to commission of offense charged in information was held not prejudicial, within Const. Cal. art. 6, § 4½, where defendant admitted possession of such liquor and its intoxicating character prior to admission of objectionable testimony. People v. Avila (Cal. App. 1926) 248 P. 693.

§ 51. Records and reports; inspection; use as evidence. All records and reports kept or filed under the provisions of this chapter* shall be subject to inspection at any reasonable hour by the commissioner or any of his agents or by any public prosecutor or by any person designated by him, or by any peace officer in the State where the record is kept, and copies of such records and reports duly certified by the person with whom kept or filed may be introduced in evidence with like effect as the originals thereof, and verified copies of such records shall be furnished to the commissioner when called for. (Oct. 28, 1919, c. 85, Title II, § 34, 41 Stat. 317.)

* See the starred note to section 11 of this title.

Notes of Decisions

1. Failure to keep records.—One unlawfully selling intoxicating liquor is not punishable for failure to keep record of sales, such statutory requirement being applicable only to permittees. U. S. v. Katz (Pa. 1926) 46 S. Ct. 513, 271 U. S. 354, 70 L. Ed. 986, affirming (D. C. 1925) 5 F.(2d) 527.

2. Inspection of records.—Under this section, right to inspect druggist permittee's records includes right to inspect also his liquor supply. In re Lobosco (D. C. Pa. 1926) 11 F.(2d) 892.

3. Method of inspection.—The right of prohibition agents under section 22 of this title and this section, and section 329 of Title 26, Internal Revenue, to inspect records of wholesale liquor dealers, gave them no right to make a forcible entry for the purpose of such inspection. U. S. v. Kraus (D. C. N. Y. 1921) 270 F. 578.

4. Searches and seizures.—The right to inspect books and papers does not give the right to seize them. U. S. v. Kraus (D. C. N. Y. 1921) 270 F. 578.

Where a person arrested as he was leaving the premises of a wholesale liquor dealer was searched and found to have concealed on his person government permits for the withdrawal of liquor, and invoices for liquor, such papers were not within the constitutional immunity against unlawful searches and seizures, as the person arrested was assisting in violating this section, and guilty of a crime under section 46 of this title, and under section 329 of Title 26, Internal Revenue. Id.

Search and seizure of liquor in drug store by officer there to inspect records required to be kept held unreasonable, and liquor seized inadmissible in evidence. In re Lobosco (D. C. Pa. 1926) 11 F.(2d) 892.

§ 52. Repeal; liquor taxes and penalties. All provisions of law that are inconsistent with this chapter are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This chapter shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this chapter relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws. (Oct. 28, 1919, c. 85, Title II, § 35, 41 Stat. 317.)

Cross-References

The portion of the original text of this section omitted here is contained in section 55 of this title.

Notes of Decisions

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II. Repeal of Prior Laws

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III. Taxes and Penalties

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I. VALIDITY AND OPERATION IN GENERAL

1. Constitutionality.—If this section authorizes the collector of internal revenue to assess on one selling liquor unlawfully the penalty therein designated as a tax, without notice or hearing to the alleged offender, it denies due process of law. Lipke v. Lederer (Pa. 1922) 42 S. Ct. 549, 259 U. S. 557, 66 L. Ed. 1061, reversing (D. C. 1921) 274 F. 493; Regal Drug Corporation v. Wardell (Cal. 1922) 43 S. Ct. 152, 260 U. S. 386, 67 L. Ed. 318.

If this section, repealing inconsistent provisions only to the extent of such inconsistency, and making the regulations for the manufacture or traffic in intoxicating liquors additional to existing laws, be construed as intended not to repeal the provisions imposing heavier penalties on the transportation and concealment of intoxicating liquors on which the revenue tax has not been paid, it would be invalid as imposing an additional penalty for the same act, contrary to Const. Amend. 5, prohibiting double jeopardy. U. S. v. Windham (D. C. S. C. 1920) 264 F. 376.

The provision in this section subjecting an offender to the payment of a special tax, collectible by the ordinary processes, is not a denial of due process of law. Ketterer v. Lederer (D. C. Pa. 1920) 269 F. 153.

Where the enactment of a statute was within the powers granted to Congress, the fact that its purpose or effect was to accomplish some result which Congress could not directly accomplish, does not invalidate the act, so that the tax on liquor dealers levied by this section is not unconstitutional, though intended to aid in enforcing prohibition. Ketterer v. Lederer (D. C. Pa. 1920) 269 F. 1010.

The courts cannot declare that the provision of this section directing the assessment, levy, and collection of an excise tax as a tax upon those engaged in the occupation or business of dealing in intoxicating liquors, which is made unlawful by the act, was not in fact a tax, but was a punishment for the unlawful act, so that its collection violated the due process of law provision of the Constitution. But see Lipke v. Lederer (Pa. 1922) 42 S. Ct. 549, 259 U. S. 557, 66 L. Ed. 1061.

A provision assessing a tax, and with a penalty declared not to absolve from criminal liability, is not invalid as to provision for both civil remedy and criminal prosecution. Pummilli v. Riordan (D. C. N. Y. 1921) 275 F. 846.

This section supplemented by section 53 of this title, empowering administrative officials to assess and collect penalties in same manner as taxes to which they are incident and giving taxpayers fair opportunity for hearing, is constitutional. Seligman v. Bowers (D. C. N. Y. 1925) 4 F.(2d) 1011, appeal dismissed (1926) 46 S. Ct. 473, 271 U. S. 642, 70 L. Ed. 1127.

2. Construction and operation in general.—The provision in this section, which repeals prior acts "only to the extent of" their inconsistency with this chapter, and the last clause, which provides that the act shall not relieve any person from any liability incurred under existing laws, must be interpreted in view of the Eighteenth Amendment and the provisions of this title intended to make that amendment effective. U. S. v. Yuginovich (Or. 1921) 41 S. Ct. 551, 256 U. S. 450, 65 L. Ed. 1043, affirming U. S. v. Yuginni (D. C. 1920) 266 F. 746.

The provision in this section for the collection of a tax and penalty for the illegal manufacture or sale of intoxicat-

ing liquor, is not to be regarded as a criminal statute. Farley v. U. S. (C. C. A. Wash. 1921) 269 F. 721.

Under this section making the regulations of this act complementary to the Revised Statutes, and section 329 of Title 26, Internal Revenue, making it a felony for a wholesale liquor dealer to fail to keep a record of sales and purchases of liquor, documents showing sales and purchases that should have been, but were not, recorded, are proper subjects of a search warrant under section 612 of Title 18, Criminal Code and Criminal Procedure, as "property used as means to commit a felony." U. S. v. Kraus (D. C. N. Y. 1921) 270 F. 578.

3. Application of prior laws.—Since the enactment of this act, a suit cannot be maintained under sections 1181 and 1182 of Title 26, Internal Revenue, for forfeiture of a vehicle as having been used to remove and conceal distilled spirits whereon a double tax has been imposed under the National Prohibition Act (incorporated in this title) with intent to defraud the United States of such tax. U. S. v. One Haynes Automobile (C. C. A. Fla. 1921) 274 F. 926.

R. S. sec. 2766 (superseded) was held applicable to intoxicating liquors unlawfully imported. U. S. v. 1,250 Cases of Intoxicating Liquors (C. C. A. N. Y. 1923) 292 F. 486, certiorari denied Rae v. U. S. (1923) 263 U. S. 712, 44 S. Ct. 38, 68 L. Ed. 519.

R. S. secs. 2774 and 2775 (repealed) requiring a vessel to report her arrival to the customs officers, were held applicable to a vessel unlawfully sending intoxicating liquors into the country. Id.

R. S. secs. 2806–2809 (repealed) relating to manifests were held applicable to intoxicating liquor unlawfully imported. Id.

R. S. sec. 2814 (repealed) requiring the production of a manifest on demand, was held applicable to a vessel unlawfully bringing intoxicating liquors into the country. Id.

R. S. sec. 2867 (repealed) requiring a permit for unloading imports, was held applicable to intoxicating liquors unlawfully imported. Id.

R. S. secs. 2872–2874 (repealed) prohibiting unloading imports at night without a special license, were held applicable to intoxicating liquors unlawfully imported. Id.

Tariff Act of 1913, sec. 3, par. H (repealed) providing for the forfeiture of the cargo of a vessel unlawfully sending merchandise into the country, is applicable to the cargo of a vessel engaged in violating the Prohibition Act (incorporated in this title). Id.

Provisions of internal revenue law are not applicable to transportation of liquor in violation of National Prohibition Act (incorporated in this title). U. S. v. One Buick Automobile (D. C. Cal. 1924) 300 F. 584.

Libel against property seized on search of a brewery, under the National Prohibition Act (incorporated in this title) will be dismissed as to count based on internal revenue laws, since the Prohibition Act was intended to and does furnish a full, complete, and adequate remedy for enforcement of national prohibition to which those employed to enforce it should be confined. U. S. v. 2,615 Barrels, More or Less, of Beer (D. C. Pa. 1924) 1 F.(2d) 500.

Where rented automobile, being unlawfully used in transportation of intoxicating liquor for beverage purposes, was abandoned, and its owner not apprehended, government was not warranted in proceeding under sections 1181 and 1182 of Title 26, Internal Revenue, thereby preventing innocent owner from reclaiming property, rather than under section 40 of this title, notwithstanding this section and section 3 of this title. U. S. v. Milstone (1925) 6 F.(2d) 481, 55 App. D. C. 356.

II. REPEAL OF PRIOR LAWS

See, also, notes to section 3 of this title.

21. In general.—This section, providing that existing statutory provisions not inconsistent with this chapter are not repealed, but are additional thereto, is only declaratory of the general law concerning repeals by implication. U. S. v. Stafoff (D. C. Mo. 1920) 268 F. 417, affirmed 43 S. Ct. 197. As this section expressly repealed all inconsistent existing laws, and provided that it was but an addition to all other existing laws, there is no implied repeal. Violette v. Walsh (D. C. Mont. 1921) 272 F. 1014, affirmed (C. C. A. 1922) 282 F. 582, certiorari denied (1923) 43 S. Ct. 246, 260 U. S. 745, 67 L. Ed. 492, and reversed without opinion Violette v. Rasmusson (1924) 44 S. Ct. 332, 264 U. S. 568, 68 L. Ed. 853. The word "inconsistent," as used in the provision in this section, repealing inconsistent laws, has a broad meaning, and, speaking generally, a law having for its primary purpose the absolute prohibition of the manufacture and sale of spirituous liquors is inconsistent with legislation seeking to derive a revenue from such manufacture and sale by the imposition of taxes. Ketchum v. U. S. (C. C. A. Ark. 1921) 270 F. 416.

Under section 7 of Title I of the National Prohibition Act (temporary) providing that the provisions of the act "shall not be construed to repeal any of the provisions of the War Prohibition Act," and the provision of this section that the act shall not relieve any person from liability incurred under existing laws, War Prohibition Act, § 1, par. 4 (temporary) was not repealed, as to offenses already committed. Vincenti v. U. S. (C. C. A. Md. 1921) 272 F. 114, certiorari denied (1921) 41 S. Ct. 538, 256 U. S. 700, 65 L. Ed. 1178. And said Act remained in force for the trial, after en-

actment of this act of a charge for selling intoxicating liquor prior to such enactment, contrary to the War Time Prohibition Act. Ford v. U. S. (C. C. A. Tex. 1921) 269 F. 609.

Defendant, convicted of violating sections 291, 306 and 307 of Title 26, Internal Revenue, and having failed to raise, by demurrer to indictment or motion in arrest of judgment, question whether such sections were repealed by National Prohibition Act (incorporated in this title) cannot after conviction and sentence have such question determined in habeas corpus proceedings. Petrai v. Archer (C. C. A. Wash. 1925) 8 F.(2d) 354; Sartori v. Archer (C. C. A. Wash. 1925) 8 F.(2d) 355.

This section recognizes as part of prohibition legislation all existing revenue laws, and at same time repeals all existing laws so far as inconsistent with National Prohibition Act (incorporated in this title). People v. Moody (D. C. Ill. 1925) 9 F.(2d) 628.

National Prohibition Act (incorporated in this title) though ineffective to impose double tax on illicit liquor, is effective to repeal prior inconsistent statutes. Coffey v. Noel (D. C. Va. 1926) 11 F.(2d) 399.

22. Alaskan laws.—Section 261 et seq. of Title 48, Territories and Insular Possessions, known as the "Alaska Bone Dry Law," was not repealed by this act and the penalties for its violation prescribed in the local act, although heavier than those imposed for the same offense by the national law, were valid and enforceable. Peterson v. U. S. (C. C. A. Alaska, 1924) 297 F. 1000; Koppitz v. U. S. (C. C. A. Alaska, 1921) 272 F. 96; Abbate v. U. S. (C. C. A. Alaska, 1921) 270 F. 735.

23. Customs laws.—Since the prohibition of importation of intoxicating liquor under section 12 of this title does not apply to all intoxicating liquor, this act did not repeal the Tariff Act of October 3, 1913 (now expressly repealed), levying customs duties upon the importation of distilled spirits and wines, nor the provisions of law for the declaration and entry of intoxicating liquor. U. S. v. Bookbinder (D. C. Pa. 1922) 281 F. 206. Nor did it exclude the operation of customs statute as to penalties and forfeitures. U. S. v. Thirty-Six Cases of Intoxicating Liquor, etc. (D. C. Tex. 1922) 281 F. 243.

The provisions of the customs statutes for forfeiture of vehicles used in unlawful importations, as applied to intoxicating liquors and their containers, are repealed by sections 39 and 40 of this title, which cover the same subject. U. S. v. One Packard Motor Truck (D. C. Mont. 1922) 284 F. 394.

Tariff on liquor held effective, notwithstanding constitutional amendment and law prohibiting importation. West v. U. S. (C. C. A. N. M. 1926) 15 F.(2d) 916.

Section 736 of Title 28 and section 483 of Title 19 have been held repealed in so far as they relate to intoxicating liquors imported into the United States. U. S. v. One Hudson Touring Car (D. C. Mich. 1921) 274 F. 473, affirmed U. S. v. Federal Ins. Co. (C. C. A. 1922) 284 F. 821.

Sections 482 and 483 of Title 19, providing for the absolute forfeiture of vehicles used in transporting merchandise illegally imported, were not abrogated by section 40 of this title. U. S. v. One Ford Automobile (D. C. Tex. 1923) 292 F. 207, wherein it was said:

"An examination of title [section] 26 [section 40 of this title] itself, in the light of the present applicable statutes, points the way to a reasonable interpretation and enforcement of all the statutes, without doing violence to any, for while the language of the section is comprehensive enough to include any officer who makes seizures, and any seizure made for illegal transportation and possession, its language being, 'whenever intoxicating liquor transported or possessed illegally shall be seized by an officer,' it is not comprehensive enough to, and cannot in the light of the present statutes be properly construed to, exclusively cover forfeitures in cases of liquor unlawfully imported or smuggled into the United States, but leaves that field entirely open to the operation of the customs statutes.

"It is proper here to say that had the facts in this case shown mere unlawful transportation and possession, no presumption could be indulged, from the mere fact of the liquors being foreign liquors, that they had been unlawfully imported, and the forfeiture would have had to be declared under the Prohibition Act [incorporated in this title].

"But since in this case the agreed facts show a case of unlawful entry into the United States, and of unlawful concealment of goods unlawfully entered, the forfeiture provisions of sections 3061 and 3062 [sections 482 and 483 of Title 19, Customs Duties] apply, and the government is entitled to a decree of absolute forfeiture under those sections, with remission of the bona fide llenor for his relief to the administrative sections of the Tariff Act [chapter 3 of Title 19] hereinabove referred to."

R. S. secs. 2806–2809, 2872 (repealed) regulating the importation of merchandise, were superseded by sections 12 and 46 of this title. Bruno v. U. S. (C. C. A. Mass. 1923) 289 F. 649.

R. S. sec. 2865 (later expressly repealed) was impliedly repealed by the National Prohibition Act (incorporated in this title) and was not revived and made effective by the amendment to such Act by section 3 of this title. U. S. v. Boasberg (D. C. La. 1922) 283 F. 305, writ of error

dismissed (1923) 43 S. Ct. 246, 260 U. S. 756, 67 L. Ed. 498.

Rev. St. § 2987 (later expressly repealed), making it a crime to defraud United States of customs duties by fraudulent withdrawal of liquor from bonded warehouse, was held not repealed by National Prohibition Act (incorporated in this title), in so far as it involved transportation which occurred before enactment of Supplementary Prohibition Act of November, 1921 (incorporated in part in this title). Becher v. U. S. (C. C. A. N. Y. 1924) 5 F.(2d) 45, certiorari denied (1925) 45 S. Ct. 462, 267 U. S. 602, 69 L. Ed. 808.

R. S. § 3005 (now expressly repealed), permitting transportation across the United States in bond of merchandise arriving from outside the United States and destined for a foreign country, was repealed in so far as it permitted the transportation of intoxicating liquors intended for beverage purposes, by the Eighteenth Amendment and section 12 of this title, prohibiting the transportation of intoxicating liquors for beverage purposes, and this section. Anchor Line (Henderson Bros.) v. Aldridge (D. C. N. Y. 1921) 280 F. 870. See, also, Grogan v. Hiram Walker & Sons (Mich. 1922) 42 S. Ct. 423, 259 U. S. 80, 66 L. Ed. 836, 22 A. L. R. 1116, reversing Hiram Walker & Sons v. Lawson (D. C. 1921) 275 F. 373, and holding that the Eighteenth Amendment prohibits the transportation of intoxicating liquors permitted by section 3005.

R. S. § 3082 (repealed) imposing a penalty for smuggling or aiding in concealing or disposing of smuggled goods, as applied to intoxicating liquors, was superseded by sections 12 and 46 of this title, prohibiting the importation of such liquor, except as therein authorized, and prescribing a less severe penalty for its violation. U. S. v. Dowling (D. C. Fla. 1922) 278 F. 630; U. S. v. McKenzie (D. C. Mich. 1922) 283 F. 667; Bruno v. U. S. (C. C. A. Mass. 1923) 289 F. 649. Contra, see Biddle v. Moreno (C. C. A. Kan. 1922) 279 F. 566; U. S. v. Bookbinder (D. C. Pa. 1922) 281 F. 207; Bookbinder v. U. S. (C. C. A. Pa. 1923) 287 F. 790, certiorari denied (1923) 43 S. Ct. 523, 262 U. S. 748, 67 L. Ed. 1213.

R. S. § 3082 (later expressly repealed) was impliedly repealed by the National Prohibition Act (incorporated in this title) and was not revived and made effective by section 3 of this title. U. S. v. Boasberg (D. C. La. 1922) 283 F. 305, writ of error dismissed (1923) 43 S. Ct. 246, 260 U. S. 756, 67 L. Ed. 498.

24. Laws respecting Indians and Indian country.—Sections 241 and 244 of Title 25, Indians, relating to the possession of intoxicating liquor in the Indian country, were not repealed by the National Prohibition Act (incorporated in this title). Kennedy v. U. S. (1924) 265 U. S. 344, 44 S. Ct. 501, 68 L. Ed. 1045, wherein the court said:

"The offense charged against plaintiffs in error is not the same as any defined in the National Prohibition Act. Those portions of the Acts of 1892, 1897, and 1918 [sections 241 and 244 of Title 25] passed for the protection of the Indian country, mentioned in the certificate of the circuit court of appeals, do not conflict with the National Prohibition Act. Both may stand. The repealing clause contained in section 35 [this section] is: 'All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency. * * *' As no incompatibility exists, there is no repeal by implication. Washington v. Miller (Okl. 1914) 235 U. S. 422, 428, 59 L. Ed. 295, 298, 35 S. Ct. 119; United States v. Greathouse (Ct. Cl. 1897) 166 U. S. 601, 605, 41 L. Ed. 1130, 1131, 17 S. Ct. 701; United States v. Healey (Ct. Cl. 1895) 160 U. S. 136, 147, 40 L. Ed. 369, 373, 16 S. Ct. 247; Frost v. Wenie (Kan. 1895) 157 U. S. 46, 58, 39 L. Ed. 614, 619, 15 S. Ct. 532; McClintic v. United States (C. C. A. Okl. 1922) 283 F. 781." To the same effect, see McClintic v. U. S. (C. C. A. Okl. 1922) 283 F. 781; Browning v. U. S. (C. C. A. Okl. 1925) 6 F.(2d) 801, certiorari denied (1926) 46 S. Ct. 25, 269 U. S. 568, 70 L. Ed. 416; Morrison v. U. S. (C. C. A. Okl. 1925) 6 F.(2d) 809; Brown v. U. S. (C. C. A. Ariz. 1925) 8 F.(2d) 433, certiorari denied (1926) 46 S. Ct. 203, 269 U. S. 587, 70 L. Ed. 426; Owens v. U. S. (C. C. A. Ariz. 1925) 8 F.(2d) 435, certiorari denied (1926) 46 S. Ct. 203, 269 U. S. 586, 70 L. Ed. 426. Sections 241, 242, and 244 of Title 25, Indians, prohibiting the sale or possession of liquor in the Indian country, were not repealed by the Eighteenth Amendment or the National Prohibition Act (incorporated in this title). Elam v. U. S. (C. C. A. Okl. 1925) 7 F.(2d) 887.

Act March 1, 1895, § 8 (omitted) prohibiting introduction of intoxicants into Indian country, was not repealed by National Prohibition Act (incorporated in this title) since offense is distinct from simple transportation of liquor. Hawley v. U. S. (C. C. A. Okl. 1926) 15 F.(2d) 621.

25. Internal revenue laws—In general.—Revenue laws requiring registration, payment of tax, and giving of bond, have been held not repealed by Eighteenth Amendment and National Prohibition Act (incorporated in this title). Mansbach v. U. S. (C. C. A. N. J. 1926) 11 F.(2d) 221.

The provision of this section, prohibiting the issuance in advance of tax-paid stamps for illegal manufacture of liquor, is in direct conflict with and repeals the provisions of prior internal revenue statutes imposing a per gallon tax on liquors, so far as relates to those illegally manufactured, and a mere transporter of moonshine whisky is not chargeable with an intent to defraud the United States of

a tax thereon, which renders the vehicle used subject to forfeiture under sections 1181 and 1182 of Title 26, Internal Revenue. Commercial Credit Co. v. U. S. (C. C. A. Ohio, 1925) 5 F.(2d) 1.

As this section expressly provides that all provisions of law that are inconsistent are repealed only to the extent of such inconsistency, and section 79 of this title, recognizes the continuance of many enumerated sections, relating to offenses against the internal revenue laws, providing that they shall not apply to industrial alcohol plants only, no implied repeal of such statutes was affected; the expression of one thing excluding another. Both this Act and the earlier revenue legislation are applicable to the unlawful manufacture of intoxicating liquor, although, if the act more lightly penalizes an offense identical with one denounced in the revenue legislation, the latter is repealed. U. S. v. Sohm (D. C. Mont. 1920) 265 F. 910.

Neither this section, nor the Eighteenth Amendment, repealed the prior revenue laws. U. S. v. One Essex Touring Automobile (D. C. Ga. 1920) 266 F. 138.

This act has been held to repeal by implication the provisions of the internal revenue laws relating to the operation of distilleries. U. S. v. Yuginni (D. C. Or. 1920) 266 F. 746, affirmed U. S. v. Yuginovich (1921) 41 S. Ct. 551, 256 U. S. 450, 65 L. Ed. 1043.

This act repeals provisions of the internal revenue laws, which prescribe different penalties for the same acts. U. S. v. Puhac (D. C. Pa. 1920) 268 F. 392.

This Act, prohibiting the manufacture and sale of intoxicants, supersedes prior revenue laws taxing such traffic, so that a person cannot be convicted for violating such revenue laws after the effective date of the Volstead Act (incorporated in this title). U. S. v. Fortman (D. C. Okl. 1920) 268 F. 873.

Under this section, providing that "all provisions of law that are inconsistent with this act [now "this chapter"] are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws," there is no general repeal of the internal revenue laws relating to the manufacture of liquor and any provision of such laws that can stand with those of the National Prohibition Act (incorporated in this title) is not repealed by implication. U. S. v. Sacein Rouhana Farhat (D. C. Ohio, 1920) 269 F. 33.

This act, which did not expressly repeal the internal revenue laws relating to distilling liquors, did not impliedly repeal them, at least so far as they related to violations already committed. Howard v. U. S. (C. C. A. Tenn. 1921) 271 F. 301.

26. —— Title 26, § 193 (Act Feb. 8, 1875, § 16).—Section 193 of Title 26, Internal Revenue (Act Feb. 8, 1875, § 16), prescribing the punishment for unlawfully carrying on the business of a retail liquor dealer without paying a special tax, is repealed by implication by this act. Farley v. U. S. (C. C. A. Wash. 1921) 269 F. 721.

27. —— Title 26, § 261.—This act which was intended to prevent the distilling of spirits for beverage purposes, and which imposed on any person violating the act a penalty of fine and imprisonment, and also double the tax theretofore imposed by existing laws with an additional specific penalty, manifests an intention to prescribe the full penalty for unlawful distilling, and repealed section 261 of Title 26, Internal Revenue, making it an offense to defraud the United States of a tax on spirits by one carrying on the business of a distillery, in so far as it relates to distilling for beverage purposes, notwithstanding the provision of this section that the act does not relieve any person from liability, civil or criminal, incurred under existing laws. U. S. v. Yuginovich (Or. 1921) 41 S. Ct. 551, 256 U. S. 450, 65 L. Ed. 1043, affirming U. S. v. Yuginni (D. C. 1920) 266 F. 746. Or the provision of this section for the assessment and collection of a tax on the illegal manufacture or sale of liquors in double the amount now provided by law, etc. Ketchum v. U. S. (C. C. A. Ark. 1921) 270 F. 416.

28. —— Title 26, § 281.—This act repealed section 281 of Title 26, Internal Revenue, imposing a penalty for possessing a still without having registered it. U. S. v. Stafoff (Mo. 1923) 43 S. Ct. 197, 260 U. S. 477, 67 L. Ed. 358; Ketchum v. U. S. (C. C. A. Ark. 1921) 270 F. 416; Sanford v. U. S. (C. C. A. Ark. 1921) 274 F. 369; Gray v. U. S. (C. C. A. Ohio, 1921) 276 F. 395; U. S. v. Windham (D. C. S. C. 1920) 264 F. 376; U. S. v. Stafoff (D. C. Mo. 1920) 268 F. 417. Contra, see U. S. v. Sohm (D. C. Mont. 1920) 265 F. 910; U. S. v. Sacein Rouhana Farhat (D. C. Ohio, 1920) 269 F. 33; U. S. v. De Large (D. C. Neb. 1921) 269 F. 820; U. S. v. Phillips (D. C. N. Y. 1920) 270 F. 281; Ex parte Lawrence (D. C. Mont. 1921) 273 F. 876, appeal dismissed Bechtold v. U. S. (C. C. A. 1921) 276 F. 816; Duvall v. Dyche (D. C. Ga. 1921) 275 F. 440.

29. —— Title 26, § 284.—Section 284 of Title 26, Internal Revenue, requiring distillers to give bond was not repealed by this act. U. S. v. Sohm (D. C. Mont. 1920) 265 F. 910; U. S. v. Sacein Rouhana Farhat (D. C. Ohio, 1920) 269 F. 33. Contra, Ketchum v. U. S. (C. C. A. Ark. 1921) 270 F. 416.

30. —— Title 26, § 290.—Section 290 of Title 26, Internal Revenue, penalizing the failure of any person manufacturing any still, etc., to notify the collector before its removal from the place of manufac-

ture, was repealed by implication by this act. Rossman v. U. S. (C. C. A. Ohio, 1922) 280 F. 950.

31. —— Title 26, § 293.—Section 293 of Title 26, Internal Revenue, was not repealed by this Act, in view of section 245 of that title imposing taxes on distilled liquors in bond, to be paid by the distiller when withdrawn, and in view of sections 57 to 60 of this title, expressly permitting the storage and limiting transportation under permit of liquor manufactured prior to the act. Bullock v. U. S. (C. C. A. Ky. 1923) 289 F. 29.

32. —— Title 26, §§ 303 and 304.—This act impliedly repeals sections 303 and 304 of Title 26, Internal Revenue, requiring a sign to be posted on a registered distillery, in so far as it applied to distilling of spirits for beverage purposes. U. S. v. Yuginovich (Or. 1921) 41 S. Ct. 551, affirming U. S. v. Yuginni (D. C. 1920) 266 F. 746; Ketchum v. U. S. (C. C. A. Ark. 1921) 270 F. 416; Sanford v. U. S. (C. C. A. Ark. 1921) 274 F. 369; U. S. v. Windham (D. C. S. C. 1920) 264 F. 376. Contra, U. S. v. Sacein Rouhana Farhat (D. C. Ohio, 1920) 269 F. 33.

33. —— Title 26, § 306.—This act impliedly repeals section 306 of Title 26, Internal Revenue, requiring a distiller to give bond, in so far as it applied to distilling of spirits for beverage purposes. U. S. v. Yuginovich (Or. 1921) 41 S. Ct. 551, 256 U. S. 450, 65 L. Ed. 1043, affirming U. S. v. Yuginni (D. C. 1920) 266 F. 746; Sanford v. U. S. (C. C. A. Ark. 1921) 274 F. 369; Gray v. U. S. (C. C. A. Ohio, 1921) 276 F. 395; U. S. v. Windham (D. C. S. C. 1920) 264 F. 376. Contra, U. S. v. Phillips (D. C. N. Y. 1920) 270 F. 281; Ex parte Lawrence (D. C. Mont. 1921) 273 F. 876, appeal dismissed Bechtold v. U. S. (C. C. A. 1921) 276 F. 816.

34. —— Title 26, § 307.—This act impliedly repeals section 307 of Title 26, Internal Revenue, making it penal to make a mash in any building other than an authorized distillery, in so far as it applied to distilling of spirits for beverage purposes. U. S. v. Yuginovich (Or. 1921) 41 S. Ct. 551, 256 U. S. 450, 65 L. Ed. 1043, affirming U. S. v. Yuginni (D. C. 1920) 266 F. 746; U. S. v. Stafoff (Mo. 1923) 43 S. Ct. 197, 260 U. S. 477, 67 L. Ed. 358; U. S. v. Stafoff (D. C. Mo. 1920) 268 F. 417, affirmed (1923) 43 S. Ct. 197, 260 U. S. 477, 67 L. Ed. 358. Contra, U. S. v. De Large (D. C. Neb. 1921) 269 F. 820; U. S. v. Phillips (D. C. N. Y. 1920) 270 F. 281. But not in so far as it related to stills for the manufacture of intoxicants for nonbeverage purposes. U. S. v. Sohm (D. C. Mont. 1920) 265 F. 910.

35. —— Title 26, § 312.—This section only repealed revenue laws which are inconsistent with this act. Ex parte Lawrence (D. C. Mont. 1921) 273 F. 876, appeal dismissed Bechtold v. U. S. (C. C. A. 1921) 276 F. 816, distinguishing Yuginovich Case (Or. 1921) 256 U. S. 450, 41 S. Ct. 551, 65 L. Ed. 1043, and holding that under the facts of the case section 312 of Title 26, Internal Revenue, was not repealed, the offense charged not involving distillation for beverage purposes.

36. —— Title 26, §§ 393 and 401.—Under the settled rules that repeals by implication are not favored, and that where the provisions of an earlier and a later statute are not absolutely irreconcilable and no purpose to repeal the earlier is expressed or clearly implied in the later, effect will, if possible, be given to both, sections 393 and 401 of Title 26, Internal Revenue, relating to bonded warehouses and prohibiting the removal of any liquor therefrom without payment of the tax, or in the absence of the storekeeper, has been held not repealed by this act, and an indictment for violation of said sections was sustained. U. S. v. Freidericks (D. C. N. J. 1921) 273 F. 188.

37. —— Title 26, § 404.—This act did not repeal section 404 of Title 26, Internal Revenue, forbidding the removal of untaxed spirits. U. S. v. Turner (D. C. Va. 1920) 266 F. 248; U. S. v. Freidericks (D. C. N. J. 1921) 273 F. 188. Contra, Reed v. Thurmond (C. C. A. S. C. 1920) 269 F. 252. Said section was in force, so far as the Volstead Act (incorporated in this title) was concerned, between the passage of such act and its going into effect. Maresca v. U. S. (C. C. A. N. Y. 1921) 277 F. 727. Certiorari denied (1922) 42 S. Ct. 183, 257 U. S. 657, 66 L. Ed. 420.

38. —— Title 26, § 411 et seq.—Bottling in Bond Act of March 3, 1897 (section 411 et seq. of Title 26, Internal Revenue), was not repealed by the National Prohibition Act (incorporated in this title). Goldberger v. U. S. (C. C. A. Del. 1925) 4 F. (2d) 10.

Section 417 of Title 26, Internal Revenue, providing a punishment for forging and counterfeiting United States bottling in bond strip stamps, was not repealed by the Eighteenth Amendment and section 24 of this title, which requires labels to be attached to containers of intoxicating liquors, in view of the fact that the National Prohibition Act (incorporated in this title) did not expressly repeal taxation of distilled spirits in bond or the practice of bottling in bond, and that this section, declares that all inconsistent provisions of law are repealed only to extent of such inconsistency, that the regulations therein prescribed shall be construed in addition to existing laws, and that the act should not relieve any one from paying any taxes or charges imposed on the manufacture or traffic in such liquor. Skilken v. U. S. (C. C. A. Ohio, 1923) 293 F. 923, affirming U. S. v. Skilken (D. C. 1923) 293 F. 916.

39. —— Title 26, §§ 1181, 1182.—R. S. § 3450 (sections 1181 and 1182 of Title 26, Internal Revenue), providing for the forfeiture of any vessel, boat, or vehicle used to remove or conceal liquor with intent to defraud the United States of the tax thereon was not repealed by this act. U. S. v. One Essex Touring Automobile (D. C. Ga. 1920) 266 F. 138; U. S. v. One Cole Aero Eight Automobile (D. C. Mont. 1921) 273 F. 934; U. S. v. One Essex Touring Automobile (D. C. Ga. 1921) 276 F. 28; The Tuscan (D. C. Ala. 1921) 276 F. 55; Reo Atlanta Co. v. Stern (D. C. Ga. 1922) 279 F. 422; U. S. v. One Buick Roadster (D. C. Mont. 1922) 280 F. 517; U. S. v. One Cadillac Automobile (D. C. Ill. 1923) 292 F. 773; at least in so far as the latter section related to the concealing and depositing of such liquors, Reo Atlanta Co. v. Stern (D. C. Ga. 1922) 279 F. 422; nor by the Eighteenth Amendment, U. S. v. One Essex Touring Automobile (D. C. Ga. 1920) 266 F. 138. Contra, One Big Six Studebaker Automobile (C. C. A. Mont. 1923) 289 F. 256. And a forfeiture may be decreed thereunder for transportation of untaxed liquors, notwithstanding the party transporting was guilty also of another offense. U. S. v. One Essex Touring Automobile (D. C. Ga. 1920) 266 F. 138. Contra, see Lewis v. U. S. (C. C. A. Tenn. 1922) 280 F. 5. It was in force with respect to an automobile seized thereunder while being used in the removal of distilled spirits a few day after this act went into effect; it not appearing that such spirits were not manufactured and subject to tax before that date. Payne v. U. S. (C. C. A. Ga. 1922) 279 F. 112. A judgment forfeiting an automobile under such section which recited that the automobile was used in transporting, concealing, and depositing liquors on which the tax had not been paid, was valid, in view of the presumption in favor of judgments, even though the portion of that section authorizing forfeiture for transporting liquors was impliedly repealed by the Volstead Act (incorporated in this title). Reo Atlanta Co. v. Stern (D. C. Ga. 1922) 279 F. 422. It was repealed by this act, so far as it applied to distilled spirits, notwithstanding the provision in this section that inconsistent laws were repealed only to the extent of the inconsistency, and that regulations therein should be additional to the existing laws. U. S. v. One Haynes Automobile (D. C. Fla. 1920) 268 F. 1003.

40. —— R. S. § 3242.—This act repealed R. S. § 3242 (incorporated in part in section 191 of Title 26, Internal Revenue), imposing a penalty for carrying on the business of a rectifier or liquor dealer without having paid the special tax. U. S. v. Stafoff (Mo. 1923) 43 S. Ct. 197, 260 U. S. 477, 67 L. Ed. 358; Schwab v. U. S. (C. C. A. Ill. 1927) 17 F.(2d) 34; U. S. v. Remus (D. C. Ohio, 1922) 283 F. 685, modified, U. S. v. Stafoff (1923) 43 S. Ct. 197, 260 U. S. 477, 67 L. Ed. 358; Rossman v. U. S. (C. C. A. Ohio, 1922) 280 F. 950; Bailey v. U. S. (C. C. A. Ark. 1921) 276 F. 27; Ketchum v. U. S. (C. C. A. Ark. 1921) 270 F. 416.

41. —— R. S. § 3244.—Section 3244 of the Revised Statutes (incorporated in part in sections 202 to 205, 791 and 799 of Title 26, Internal Revenue) has been repealed by implication. Ravitz v. Hamilton (D. C. Ky. 1921) 272 F. 721.

42. —— R. S. § 3251.—R. S. § 3251 (incorporated in part in section 249 of Title 26, Internal Revenue), imposing a tax on manufacturers of distilled spirits, is not inconsistent with this act, and is still in force, as the manufacture of distilled spirits regardless of their purpose is not unlawful. Violette v. Walsh (D. C. Mont. 1921) 272 F. 1014, affirmed (C. C. A. 1922) 282 F. 582, certiorari denied (1923) 43 S. Ct. 246, 260 U. S. 745, 67 L. Ed. 493, and reversed without opinion, Violette v. Rasmusson (1924) 44 S. Ct. 332, 264 U. S. 568, 68 L. Ed. 853.

43. State laws.—See, also, notes to section 1 of this title.

The Volstead Act (incorporated in this title) did not, in view of the provision of the Eighteenth Amendment as to "concurrent power," annul previous state legislation appropriate to the enforcement of that amendment.

Alabama.—Layment v. State (1922) 18 Ala. App. 441, 93 So. 66; Newman v. State (1922) 18 Ala. App. 430, 93 So. 55; Underwood v. State (1922) 18 Ala. App. 611, 93 So. 325; Spencer v. State (1923) 95 So. 61, 19 Ala. App. 95; Tribble v. State (1923) 95 So. 827, 19 Ala. App. 172; Miller v. State (1923) 96 So. 718, 19 Ala. App. 229.

Michigan.—People v. Trudell (1922) 220 Mich. 166, 189 N. W. 910.

New Jersey.—Woodruff v. West Orange (1922) 117 A. 835, 97 N. J. Law, 465.

South Carolina.—State v. McDuffie (1922) 120 S. C. 290, 113 S. E. 121.

Tennessee.—Baker v. State (1923) 147 Tenn. 421, 284 S. W. 548.

Virginia.—Miller v. Commonwealth (1923) 115 S. E. 512, 135 Va. 597.

Washington.—State v. McFee (1922) 121 Wash. 425, 209 P. 683; State v. Montgomery (1922) 121 Wash. 617, 209 P. 1099; State v. Allen (1922) 122 Wash. 199, 210 P. 359; State v. Kichinko (1922) 122 Wash. 251, 210 P. 364.

State laws in furtherance of prohibition are not repealed. Jones v. State (1921) 90 So. 135, 18 Ala. App. 116; Ewing v. State (1921) 90 So. 136, 18 Ala. App. 166; Ricketts v. State (1921) 90 So. 137, 18 Ala. App. 162; Powell v. State (1921) 90 So. 138, 18 Ala. App. 101.

Statutes forbidding sale without a license, in so far as they prohibited the sale of intoxicating liquors for beverage

purposes, retain and still possess their original force and vigor, undiminished and unimpaired. Weisengoff v. State (1923) 143 Md. 638, 123 A. 107, affirmed Molinari v. State of Maryland (1924) 44 S. Ct. 179, 263 U. S. 685, 68 L. Ed. 506.

This act does not repeal a state statute prohibiting the sale of intoxicating liquors in a certain county of the state. Molinari v. State (1922) 141 Md.. 565, 119 A. 291, affirmed (1924) 44 S. Ct. 179, 263 U. S. 685, 68 L. Ed. 506.

The Volstead Act (incorporated in this title) enacted under the Eighteenth Amendment, does not supersede state statutes relative to the possession of intoxicating liquors, and the operation of the Volstead Act does not control state statutes regulating the possession of intoxicating liquors except that in so far as the federal act expressly permits the possession of intoxicating liquors in the bona fide residence of a person, where such liquors were lawfully obtained and are used only for the family purposes stated in the federal act, the state is by the Fourteenth Amendment forbidden to abridge the privilege expressly conferred by the federal law. Spooner v. Curtis (1923) 96 So. 836, 85 Fla. 408.

State legislation which prohibits every sale of spirituous liquors without a license, the law applying however small the percentage of alcohol, and although the liquor may not be intoxicating, and although it may be sold only for industrial purposes, was not superseded by the adoption of the Eighteenth Amendment and the enactment of the Volstead Act of October 28, 1919 (incorporated in this title) to enforce that amendment. Vigliotti v. Pennsylvania (Pa. 1922) 258 U. S. 403, 42 S. Ct. 330, 66 L. Ed. ——, affirming Com. v. Vigliotti (1921) 271 Pa. 10, 115 A. 20, wherein the court said: "In the court of quarter sessions of Fayette county, Pennsylvania, Vigliotti was found guilty of selling, during the spring of 1920, spirituous liquor without a license, in violation of § 15 of the Act of May 13, 1887, P. L. 108, known as the Brooks Law. The liquor so sold was a preparation called Jamaica ginger, containing 88 per cent. of alcohol. The defendant claimed seasonably that the state law, as applied, deprived him of rights guaranteed by the Federal Constitution, because the sales complained of had been made after January 16, 1920, when the 18th Amendment became effective, after which the Volstead Act [incorporated in this title] was the only law applicable to sales of intoxicating liquors. This claim was overruled by the trial court; the defendant was sentenced; the judgment was affirmed by both the superior court (75 Pa. Super. Ct. 366) and the supreme court of the state ([1921] 271 Pa. 10, 115 A. 20); and the case comes here on writ of error, under § 237 of the Judicial Code, as amended [section 344 of Title 28, Judicial Code and Judiciary]. The question presented for our decision is whether the provision of the Brooks Law, here applied, has been superseded by the 18th Amendment and the Volstead Act.

"The Brooks Law, as construed by the courts of the state, prohibits every sale of spirituous liquor without a license, excepting only such sales as are made by druggists; and these are forbidden to sell intoxicating liquors except on prescription of a regular physician. The law applies however small the percentage of alcohol, and although the liquor is not intoxicating. It applies to liquor sold solely for industrial uses. It does not purport to confer upon anyone, anywhere, the right to a license; nor does it authorize the sale of liquor in any city or county having a special prohibitory law. It merely grants to the appropriate officials, where such authority exists, discretion to give or to withhold the license under the conditions prescribed. In case of an indictment for selling without a license, a sale is presumed to be unlawful, and the burden is on the defendant to show the authority on which he acted. It is thus primarily a prohibitory law; and its prohibitory features are not so dependent upon those respecting license as to be swept away by the 18th Amendment and the Volstead Act. The supreme court declared further that 'the Brooks Law still survives, as Pennsylvania's own police-power method of officially listing and adequately controlling the customary sources of general supply and distribution, to the peoples within her borders, of those kinds of liquors among which intoxicating beverages are usually found, and she may thus assist in prohibiting their illegal use as such.' 271 Pa. 15, 115 A. 20. We, of course, accept as controlling the construction given to the statute by the highest court of the state. The question before us is whether, so construed, the statute violates the Federal Constitution.

"The Brooks Law, as thus construed, does not purport to authorize or sanction anything which the 18th Amendment or the Volstead Act prohibits. And there is nothing in it which conflicts with any provision of either. It is merely an additional instrument which the state supplies in the effort to make prohibition effective. That the state may, by appropriate legislation, exercise its police power to that end, was expressly provided in § 2 of the Amendment, which declares that 'Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.' National Prohibition Cases (Rhode Island v. Palmer) (R. I. 1920) 253 U. S. 350, 387, 64 L. Ed. 946, 978, 40 S. Ct. 486, 588. That the Brooks Law, as construed, is appro-

priate legislation, is likewise clear. To prohibit every sale of spirituous liquors except by licensed persons may certainly aid in preventing sales for beverage purposes of liquor containing as much as ½ of 1 per cent. of alcohol; and that is what the Volstead Act prohibits. If the Brooks Law, as construed, had been enacted the day after the adoption of the Amendment, it would obviously have been 'appropriate legislation.' It is not less so because it was already in existence."

44. Effect of repeals.—Where an indictment plainly purported to be drawn under the provisions of the revenue laws which were subsequently declared to have been repealed by this act, it would be unjust to treat the conviction as covering an offense under the National Prohibition Act (incorporated in this title) which was a law of fundamentally different policy, even though facts could be spelled out that might fall within the latter, so that defendant cannot be sentenced under the National Prohibition Act after a conviction under such indictment. U. S. v. Stafoff (Mo. 1923) 43 S. Ct. 197, 260 U. S. 477, 67 L. Ed. 358.

The repeal of section 281 of Title 26, Internal Revenue, imposing a penalty for possessing a still without having registered it with the collector of internal revenue, by this act, invalidated an indictment for the unlawful possession of a still, even though it was alleged therein that the liquor was to be manufactured for commercial as well as for beverage purposes. Id.

Section 3 of this title, providing that all laws in regard to the manufacture of and traffic in intoxicating liquor, and all penalties for violation of such laws in force when the National Prohibition Act (incorporated in this title) was enacted, shall be continued in force, except such provisions as are directly in conflict with the National Prohibition Act, or Act Nov. 23, 1921, c. 134 (incorporated in part in this title), even if it purported to construe this act as leaving in force the prior statutes which the Supreme Court had declared were repealed by this act, could not give retrospective criminality to acts that were done before it was passed, and that were not criminal, except for the statutes held to have been repealed. Said section 3, was in effect a re-enactment of the provisions of the revenue laws relating to manufacture and sale of intoxicating liquors, which had been repealed by this act, so that prosecutions may be maintained for the violation of those revenue acts, committed after the supplemental act took effect, though not for such acts subsequent to the National Prohibition Act, and before the effective date of the supplemental act. Id.

The provision of this section that this chapter shall not "relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws," does not affect a prosecution for a violation of the internal revenue laws prior to the time of taking effect of the National Prohibition Act (incorporated in this title). Alexander v. Thurmond (C. C. A. S. C. 1921) 272 F. 474. Accordingly it has been held that this act did not repeal any part of the internal revenue laws, so far as relates to punishment for offenses previously committed. Tisch v. U. S. (C. C. A. Ohio, 1921) 274 F. 208. That where the acts on which the prosecution relied as showing a violation of sections 303, 304, and 306 of Title 26, Internal Revenue, regulating the operation of distilleries, were committed in December, 1919, which was before the National Prohibition Act (incorporated in this title) took effect, the prosecution therefor was saved by this section, even though the indictment was not found until after the latter act took effect. Baird v. U. S. (C. C. A. Tenn. 1922) 279 F. 509. That one who had committed the offense of selling intoxicating liquors without having paid the special tax required of retail liquor dealers, prior to the adoption of the Eighteenth Amendment and the enactment of this act, could be tried and punished for that offense after national prohibition took effect, under R. S. § 13 (section 29 of Title 1, General Provisions), providing that the repeal of any statute shall not have the effect to release any penalty unless the repealing act shall expressly so declare. Goldberg v. U. S. (C. C. A. Ga. 1922) 280 F. 89, certiorari denied (1922) 43 S. Ct. 92, 260 U. S. 728, 67 L. Ed. 484.

In prosecution for violation of regulations concerning the distillation of liquors prior to repeal thereof by this section, testimony as to execution of defendants' appearance bonds has been held harmless, where not followed by other evidence; testimony therefore becoming immaterial. Kirk v. U. S. (C. C. A. Okl. 1922) 280 F. 506.

In Robillo v. U. S. (C. C. A. Tenn. 1923) 291 F. 975, certiorari denied (1923) 44 S. Ct. 137, 263 U. S. 716, 68 L. Ed. 522, the court said: "The proposition that the Reed Amendment [omitted in part as superseded] was repealed by the Volstead Act [incorporated in this title] is without force as applied to the instant case (41 Stat. 305). The indictment charges that the offense here in question was committed 'on or about the ———— day of April, A. D. 1919.' The Volstead Act did not take effect until January 16, 1920 (Dillon v. Gloss (Cal. 1921) 256 U. S. 368, 41 S. Ct. 510, 65 L. Ed. 994), and expressly provided (section 35 of title 2 [this section]) that it should not 'relieve any person from any liability civil or criminal, heretofore or hereafter incurred

under existing laws.' Under this clause we have more than once held that prosecutions under the revenue sections committed before January, 1920, were saved. Howard v. United States (C. C. A. Tenn. 1921) 271 F. 301, 302; Tisch v. United States (C. C. A. Ohio, 1921) 274 F. 208; Baird v. United States (C. C. A. Tenn. 1922) 279 F. 509, 511. No reason is apparent why the same rule should not apply to prosecutions under the Reed Amendment."

Where a statute provides that "All payments or compensation for liquors sold in violation of law, whether in money, labor or personal property, shall be held and considered, as between the parties to such sale, to have been received in violation of law, without consideration and against equity and good conscience," the fact that such statute was repealed by this act does not prevent the recovery of a payment made in violation of the state statute prior to its repeal. Grande v. Eagle Brewing Co. (1922) 117 A. 640, 44 R. I. 424.

III. TAXES AND PENALTIES

61. In general.—The provision of this section fixing the tax for the illegal manufacture of liquor "in double the amount now provided by law," with additional penalties, means double the amount of actual taxes (not penalties) provided by revenue laws in force at the date of the enactment of the National Prohibition Law (incorporated in this title), and under it an illegal manufacturer is liable for double taxes assessable, plus an additional penalty of $1,000. Millos v. Dunbar (D. C. Utah, 1924) 1 F.(2d) 722.

The assessment of penalties by a collector of internal revenue against a person as a liquor dealer and their payment or compromise by him under this section, does not relieve him from criminal liability under this title. U. S. v. Bullinger (D. C. N. Y. 1923) 290 F. 395. The court said:

"The imposition of the tax by the collector which is a penalty, is civil in its nature; whereas, the prosecution under the information is criminal, and the collection of the civil penalty would not place the defendant in such jeopardy that it can be contended that a trial under the criminal information would again place him in jeopardy. Ex parte Glenn (C. C. W. Va. 1901) 111 F. 257, 261, reversed without opinion, Moss v. Glenn (1903) 23 S. Ct. 85, 189 U. S. 506, 47 L. Ed. 921; Berkowitz v. U. S. (Pa. 1899) 93 F. 452, 35 C. C. A. 379; Matter of Leszynsky (C. C. N. Y. 1879) 16 Blatchf. 9 Fed. Cas. No. 8,279; U. S. v. Olsen (D. C. Cal. 1893) 57 F. 579; U. S. v. Flecke (D. C. N. Y. 1868) Fed. Cas. No. 15,120; U. S. v. 3 Copper Stills (D. C. Ky. 1890) 47 F. 495, 499.

"Even if it might be said that generally the placing of the defendant on trial, on a criminal charge, after the compromise of a civil penalty, would be again placing him in jeopardy, that construction cannot prevail against the clear provision of the law herebefore cited, in which it is provided:

" 'The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve any one from criminal liability.'

"Nor can it be contended that by the compromise it was intended to relieve the defendant from criminal prosecution, because, as appears from the law hereinbefore cited, the Commissioner, with the approval of the Secretary of the Treasury, is authorized to compromise any civil cause; but nothing is said about any right to compromise in criminal cases, and therefore that power is limited to civil causes only."

After plea of guilty to charge of manufacturing liquor, invalidity of statute imposing tax on liquor, as punishing crime without jury trial, cannot be urged. Coffey v. Noel (D. C. Va. 1926) 11 F.(2d) 399.

62. Power of Congress.—Congress may impose a tax on the importation of merchandise, the importation of which it forbids. U. S. v. Cahill (C. C. A. Mass. 1926) 13 F.(2d) 83.

63. Nature or character of exaction.—A so-called "tax" assessed under this section is a penalty. Thome v. Lynch (D. C. Minn. 1921) 269 F. 995; Fontenot v. Accardo (C. C. A. La. 1922) 278 F. 871, affirming, Accardo v. Fontenot (D. C. La. 1920) 269 F. 447; Pool v. Walsh (C. C. A. Mont. 1922) 282 F. 620; Jakovich v. Mager (C. C. A. Ill. 1922) 283 F. 980; U. S. ex rel. Phillips v. Di Marco (D. C. Pa. 1926) 14 F.(2d) 238. Contra, see Kelly v. Lewellyn (D. C. Pa. 1921) 274 F. 108.

The double tax provided for in this section and the penalties prescribed are nothing more nor less than punishment for the commission of criminal offenses. Ledbetter v. Bailey (D. C. N. C. 1921) 274 F. 375. They lack all the ordinary characteristics of a tax, whose function is to provide for the support of the government, and clearly involve the idea of punishment for infraction of the law, the definite function of a penalty. Lipke v. Lederer (Pa. 1922) 42 S. Ct. 549, 259 U. S. 557, 66 L. Ed. 1061, reversing (D. C. 1921) 274 F. 493. The character of the special taxes is changed from taxes, strictly so called, for the production of revenue, to penalties. They are "penalties," since they are so named, are for the purpose of punishment, and are embodied in a penal statute, and not a "tax," which is defined as an enforced contribution for the payment of public expenses. Thome v. Lynch (D. C. Minn. 1921) 269 F. 995.

The word "penalty" is used in its ordinary legal meaning as a sum of money which the law exacts by way of punishment for the doing of some act which the law forbids, or for the failure to do some act which it requires to be done, not as a synonym for "fine," since the act elsewhere provides a fine for the offense. Kausch v. Moore (D. C. Mo. 1920) 268 F. 668.

The mere use of the word "tax" in an act primarily designed to define and suppress crime is not enough to show that a tax was laid; but, if by its very nature the imposition is a penalty, it must be so regarded. Lipke v. Lederer (Pa. 1922) 42 S. Ct. 549, 259 U. S. 557, 66 L. Ed. 161, reversing (D. C. 1921) 274 F. 493.

Tax imposed on illegal manufacture of liquor by this section, is not in fact a tax, but a penalty for the execution of which evidence of violation of section 46 of this title is a condition precedent, notwithstanding section 53 of this title providing that such taxes and penalties shall be assessed and collected in same manner as other liquor taxes. Dukich v. Blair (D. C. Wash. 1925) 3 F.(2d) 302, appeal dismissed, Blair v. Dukich (1926) 46 S. Ct. 469, 270 U. S. 670, 70 L. Ed. 791.

The impositions provided by this section are not taxes, but penalties for violation of the act, and their character is not changed by sections 3 and 53 of this title. Jasper v. Hellmich (D. C. Mo. 1925) 4 F.(2d) 852.

This section does not provide for a "tax" within time meaning of term so as to constitute a revenue provision. U. S. v. McConnell (D. C. Pa. 1926) 10 F.(2d) 973.

Penalty in addition to tax on illicit liquor is at least partly punitive and imposed in part for punishment of crime. Coffey v. Noel (D. C. Va. 1926) 11 F.(2d) 399.

So-called tax, imposed by this section, for manufacture for sale, or sale, in violation of the act, being a penalty, it cannot be collected by distraint without affording offender opportunity for constitutional hearing. U. S. ex rel. Phillips v. Di Marco (D. C. Pa. 1926) 14 F.(2d) 238.

64. Liability to tax or penalty.—The statutes impose tax on illicit liquor. U. S. v. One Ford Coupé Automobile (Ala. 1926) 47 S. Ct. 154, 272 U. S. 321, 71 L. Ed. —, 47 A. L. R. 1025.

That the manufacture of distilled spirits is in violation of regulations and for beverage purposes, which the National Prohibition Act (incorporated in this title) forbids, does not avoid the tax imposed by R. S. § 3251 (incorporated in part in section 249 of Title 26, Internal Revenue), as defendant cannot plead his own wrong, and will not be heard to say that he was manufacturing the liquor for beverage purposes. Violette v. Walsh (D. C. Mont. 1921) 272 F. 1014, affirmed (C. C. A. 1922) 282 F. 582.

The fact that a party illicitly manufactured intoxicating liquors did not exempt him from a tax assessment, under section 245 of Title 26, Internal Revenue imposing a tax on the manufacture of distilled spirits, in view of the provision in this section that "this act [now "this chapter"] shall not relieve any one from paying any tax imposed upon the manufacture or traffic in such liquor." Violette v. Walsh (C. C. A. Mont. 1922) 282 F. 582, certiorari denied (1923) 43 S. Ct. 246, 260 U. S. 745, 67 L. Ed. 492, and reversed without opinion, Violette v. Rasmusson (1924) 44 S. Ct. 332, 264 U. S. 568, 68 L. Ed. 853. But it has been held that this provision refers to intoxicating liquor for nonbeverage purposes, as to which regulations are provided for its manufacture and sale, and the act is not intended as a taxing measure in respect of intoxicating liquors for beverage purposes. U. S. v. 2,000 Cases of Whisky, 25 Barrels of Whisky, and 253 Barrels of Wine (C. C. A. N. Y. 1921) 277 F. 410.

The fact that defendant had been convicted under the National Prohibition Act (incorporated in this title) of conspiring to unlawfully possess and transport intoxicating liquor was no defense to an assessment against defendant of a federal tax for manufacturing the liquor in question, as this did not constitute double punishment for the same offense. Violette v. Walsh (C. C. A. Mont. 1922) 282 F. 582, certiorari denied (1923) 43 S. Ct. 246, 260 U. S. 745, 67 L. Ed. 492, and reversed without opinion, Violette v. Rasmusson (1924) 44 S. Ct. 332, 264 U. S. 568, 68 L. Ed. 853.

This section authorizes assessment of penalties only for illegal manufacture or sale of liquor, and they may not be imposed on one for having liquor in his possession for sale. U. S. v. Guthrie (D. C. Ohio, 1922) 283 F. 704.

Since the passage of the National Prohibition Act (incorporated in this title) which repealed Rev. St. § 3244 (4), incorporated in section 205 of Title 26, Internal Revenue there is no statute in force imposing a tax on wholesale liquor dealers. Bailey v. U. S. (C. C. A. Ga. 1925) 5 F.(2d) 437, writ of error dismissed (1925) 46 S. Ct. 12, 269 U. S. 589, 70 L. Ed. 427.

Penalty in addition to tax on illicit liquor has been held unlawful, no notice of assessment being provided for in statute. Coffey v. Noel (D. C. Va. 1926) 11 F.(2d) 399.

65. Assessment and collection—In general.—Even though this act does not prohibit the acceptance of the internal revenue tax on whisky stored in bond from one who had no right under that act to remove the whisky from the warehouse, eq-

uity will not compel the acceptance of such tax, and the delivery of possession to the owner of the whisky. Corneli v. Moore (D. C. Mo. 1920) 267 F. 456, affirmed (1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332.

Under the revenue statutes, when construed with National Prohibition Act (incorporated in this title), and section 245 of Title 26, Internal Revenue, Commissioner of Internal Revenue is eligible to receive taxes on intoxicating liquors. U. S. v. One Ford (D. C. Tenn. 1924) 2 F.(2d) 882.

Grossly excessive tax on illicit liquor, assessed without notice, were held wholly invalid, and taxpayer was entitled to equitable relief. Coffey v. Noel (D. C. Va. 1926) 11 F.(2d) 399.

Collection of a so-called "tax" assessed by a collector of internal revenue under this section for an alleged violation of the act, cannot be enforced by filing such assessment as a lien under section 115 of Title 26, Internal Revenue, and causing an attachment to be issued thereon against the property of the person charged. U. S. v. Zerbey (D. C. Pa. 1922) 282 F. 332.

It has been held that procedure for collecting the taxes assessed under this section for illegal manufacture or sale of liquor with additional penalty is governed by the Internal Revenue Law; such procedure not being inconsistent with the National Prohibition Act (incorporated in this title) and not repealed by implication. Pummill v. Riordan (D. C. N. Y. 1921) 275 F. 846.

And penalties provided for violation of National Prohibition Act (incorporated in this title) under this section, supplemented by Act Nov. 23, 1921 (incorporated in part in this title), may be assessed and collected by administrative officials in same manner as taxes to which they are incident, notwithstanding such penalties involve punishment, since taxpayer is given fair opportunity for hearing. Seligman v. Bowers (D. C. N. Y. 1925) 4 F.(2d) 1011, appeal dismissed (1926) 46 S. Ct. 473, 271 U. S. 642, 70 L. Ed. 1127.

But it has also been held that the impositions authorized by this section for violations of the act, being penalties, may not lawfully be assessed by administrative officers. Middleton v. Moe (D. C. S. D. 1921) 277 F. 492; Ledbetter v. Bailey (D. C. N. C. 1921) 274 F. 375; Regal Drug Corporation v. Wardell (Cal. 1922) 43 S. Ct. 152, 260 U. S. 386, 67 L. Ed. 318.

And that the commissioner has no authority to assess taxes and penalties for unlawful manufacture of liquor, without notice to person assessed. Millos v. Dunbar (D. C. Utah, 1924) 1 F.(2d) 722.

And the action of the Internal Revenue Department in making assessments of taxes for illegal manufacture of liquor, filing liens and issuing warrants of distraint against citizens who had no notice or knowledge of the proceedings, and in many cases had not been charged with any offense, based on reports of prohibition agents has been held without authority of law. Ledbetter v. Bailey (D. C. N. C. 1921) 274 F. 375.

66. —— Distraint.—A contention that this section, as construed by the collector of internal revenue to authorize distraint by the collector to enforce a penalty assessed by him without a hearing, conflicts with the federal Constitution, is substantial, and sufficient to support the jurisdiction of the Supreme Court on direct appeal from the District Court. Lipke v. Lederer (Pa. 1922) 42 S. Ct. 549, 259 U. S. 557, 66 L. Ed. 1061, reversing (D. C. 1921) 274 F. 493.

Penalties and so-called taxes for alleged violations of the National Prohibition Act (incorporated in this title) cannot be imposed and summarily enforced by distraint of property, without notice and an opportunity to be heard. Regal Drug Co. v. Wardell (Cal. 1922) 260 U. S. 386, 43 S. Ct. 152, 67 L. Ed. 318, reversing (C. C. A. 1921) 273 F. 182, and following Lipke v. Lederer (Pa. 1922) 259 U. S. 557, 42 S. Ct. 549, 66 L. Ed. 1061.

Since before the adoption of the Eighteenth Amendment, the collector of internal revenue could distrain to collect only taxes and certain penalties expressly authorized by R. S. §§ 3176, 3187 (sections 97, 98, and 116 of Title 26, Internal Revenue), and section 45 of this title, merely confers on the Commissioner of Internal Revenue, for the enforcement thereof, the powers conferred by law for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquors, the exactions from dealers in prohibited liquors, prescribed by this section which are penalties, cannot be collected by distraint, especially since the preliminary steps provided by section 91 of Title 26, and the notice and demand required by section 104 of Title 26 are not suitable as procedure for the collection of such penalties, and a civil suit may be maintained to recover them under the regulations of the Internal Revenue Department. Thome v. Lynch (D. C. Minn. 1921) 269 F. 995.

The impositions authorized by this section for violations of this act, being penalties, may not be enforced by distraint and sale of property without a judicial hearing. Jakovich v. Mager (C. C. A. Ill. 1922) 283 F. 980; Accardo v. Fontenot (D. C. La. 1920) 269 F. 447, affirmed, Fontenot v. Accardo (C. C. A. 1922) 278 F. 871; Thome v. Lynch (D. C. Minn. 1921) 269 F. 995; Connelly v. Gardner (D. C. N. Y. 1921) 272 F. 911; Kelly v. Lewellyn (D. C. Pa. 1921) 274 F. 112; Ledbetter v. Bailey (D. C. N. C. 1921) 274 F. 375; Middleton v. Mee (D. C. S. D. 1921) 277 F. 492; Fontenot v. Accardo (C. C. A. La. 1922) 278 F. 871, affirming Accardo v. Fontenot (D. C.

1920) 269 F. 447. Their collection by distraint would not be due process of law. Lipke v. Lederer (Pa. 1922) 42 S. Ct. 549, 259 U. S. 557, 66 L. Ed. 1061, reversing (D. C. 1921) 274 F. 493; Kausch v. Moore (D. C. Mo. 1920) 268 F. 668; Thome v. Lynch (D. C. Minn. 1921) 269 F. 995.

Administrative enforcement of the so-called taxes imposed by this section, for the illegal manufacture of liquor by assessment and distraint proceedings against property, under sections 3 and 53 of this title, is violative of due process and denies the right of trial by jury guaranteed by Const. Amend. 6. Dukich v. Blair (D. C. Wash. 1925) 3 F.(2d) 302, appeal dismissed Blair v. Dukich (1926) 46 S. Ct. 469, 270 U. S. 670, 70 L. Ed. 791.

Neither so-called "taxes" nor penalties may be assessed, under this section, without preliminary proof of violation of law, which must be made in proceedings which constitute due process of law, and executive officers are without power to make such finding, and to assess such impositions, and enforce the same by distraint. Jasper v. Hellmich (D. C. Mo. 1925) 4 F. (2d) 852.

67. —— Collection by suit.—The penalties imposed by this section, which provides that a tax in double the amount provided by existing law shall be assessed against and collected from any person responsible for illegal manufacture or sale of liquor, "with an additional penalty of $500 on retail dealers and $1,000 on manufacturers," can be enforced only by suit in the District Court, under section 41 (par. 9) of Title 28, Judicial Code and Judiciary. Kelly v. Lewellyn (D. C. Pa. 1921) 274 F. 112.

The penalties prescribed in this section must be collected by civil actions or pronounced as judgments in criminal cases. Ledbetter v. Bailey (D. C. N. C. 1921) 274 F. 375; Thome v. Lynch (D. C. Minn. 1921) 269 F. 995.

In suit to recover liquor taxes, paid under protest, counterclaim for full amount of bond given to obtain permit to sell, set up in affidavit of defense, held insufficient; amount of such bond being, not measure, but limit, of plaintiff's liability for breach of its conditions. O'Kane v. Lederer (D. C. Pa. 1923) 4 F.(2d) 418. For same case at later stage, see Lederer v. McGarvey (1926) 46 S. Ct. 534, 271 U. S. 342, 70 L. Ed. 977.

68. Equitable relief against assessment or collection.—The so-called taxes or penalties prescribed by this section, on account of the sale or manufacture of intoxicants, are merely additional penalties for violation of a criminal statute, and a suit to enjoin collection of such penalties does not fall within section 154 of Title 26, Internal Revenue, declaring that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. Lipke v. Lederer (Pa. 1922) 42 S. Ct. 549, reversing (D. C. 1921) 274 F. 493; Regal Drug Corporation v. Wardell (Cal. 1922) 43 S. Ct. 152, 260 U. S. 386, 67 L. Ed. 318, reversing (C. C. A. 1921) 273 F. 182; Fontenot v. Accardo (C. C. A. La. 1922) 278 F. 871, affirming Accardo v. Fontenot (D. C. 1920) 269 F. 447; Pool v. Walsh (C. C. A. Mont. 1922) 282 F. 620; Kausch v. Moore (D. C. Mo. 1920) 268 F. 668; Thome v. Lynch (D. C. Minn. 1921) 269 F. 995; Connelly v. Gardner (D. C. N. Y. 1921) 272 F. 911; Ledbetter v. Bailey (D. C. N. C. 1921) 274 F. 375; Middleton v. Mee (D. C. S. D. 1921) 277 F. 492; Coffey v. Noel (D. C. Va. 1926) 11 F.(2d) 399; Danciger v. Crooks (D. C. Mo. 1926) 13 F.(2d) 642. Contra, see Violette v. Walsh (D. C. Mont. 1921) 272 F. 1014, affirmed (C. C. A. 1922) 282 F. 582, certiorari denied (1923) 43 S. Ct. 246, 260 U. S. 743, 67 L. Ed. 492, and reversed without opinion Violette v. Rasmussen (1924) 44 S. Ct. 332, 264 U. S. 568, 68 L. Ed. 853; Kelly v. Lewellyn (D. C. Pa. 1921) 274 F. 108; Ketterer v. Lederer (D. C. Pa. 1920) 269 F. 153.

In view of the instructions issued by the Internal Revenue Department that no suit for recovery of internal revenue taxes or penalties, including those under the National Prohibition Act (incorporated in this title), may be maintained until appeal shall have been made to the Commissioner of Internal Revenue, as well as the statement that in prohibition cases the enforcement of the tax may be more effective than the imposition of criminal liabilities, collection of such of the taxes and penalties prescribed by this section, might be enjoined where it appeared an appeal or plea of abatement would be unavailing, and there was an attempt to enforce such taxes and penalties against several defendants, one of whom had been acquitted of the charge of unlawful possession of intoxicants, which carries no penalty, another never brought to trial, and the third not charged with any offense, for it was obvious from the instructions issued that the Internal Revenue Department was seeking to administer the law without reference to the courts. Accardo v. Fontenot (D. C. La. 1920) 269 F. 447, affirmed Fontenot v. Accardo (C. C. A. 1922) 278 F. 871.

Equity may relieve against grossly excessive and wholly invalid tax on illicit liquor, assessed under this section, without notice. Coffey v. Noel (D. C. Va. 1926) 11 F.(2d) 399.

But see Pummill v. Riordan (D. C. N. Y. 1921) 275 F. 846, holding that as the provisions of the internal revenue laws for collection apply to the taxes and penalty under this section for illegal manufacture and sale, collection thereunder cannot be restrained; there being adequate remedy by proceedings to obtain a refund, and subsequent suit, if necessary,

for recovery. As injunction does not lie to restrain collection of tax and penalty under the National Prohibition Act (incorporated in this title), by the internal revenue collector, the contention that the petitioners owed no tax, because they had paid annual retailers' license fee, which had not expired, was not determinable in a suit for injunction.

And see Kausch v. Moore (D. C. Mo. 1920) 268 F. 668, holding that section 154 of Title 26, Internal Revenue, prohibits an injunction to restrain the collection of the double internal revenue tax imposed on one who illegally sells intoxicating liquor by this section, so that a bill to restrain the distraint of goods by the collector for the enforcement of that tax and the penalty in addition thereto must be dismissed, unless the plaintiff has paid or tendered the double tax imposed upon him.

In that case, it was also held, however, that an injunction may be granted to restrain illegal distraint of property for collection of the penalty in addition to the double tax imposed for unlawful sale of liquor by this section, notwithstanding the right to pay such penalty under protest and bring suit to recover the payment, the remedy by payment and subsequent recovery not being adequate, especially where the person assessed has not sufficient funds to make payment, and the sale of his goods on distress would practically ruin his business. Id.

69. —— Time for application.—Application for preliminary injunction to restrain internal revenue officials from assessing and collecting taxes or penalties under this section, Revenue Act 1918, § 600 (a), and Revenue Act 1921, § 600 (section 245 of Title 26, Internal Revenue), for an alleged violation of National Prohibition Act (incorporated in this title), has been held premature; no assessment having been made, and no proceeding for seizure of property by distraint having been instituted or threatened, but merely notice of proposed assessment and of proposed hearing having been given. U. S. Industrial Alcohol Co. v. Blair (D. C. Pa. 1925) 6 F.(2d) 658.

70. —— Bill.—Bills alleging that the collector of internal revenue was threatening distraint of plaintiffs' property to enforce collection of the penalties prescribed by this section, that plaintiffs cannot pay the amounts demanded, and that seizure and sale would ruin their business, entitle the plaintiffs to preliminary injunctions, since section 154 of Title 26, Internal Revenue, does not bar such relief, the remedies provided by R. S. § 3225 (repealed) and section 3226 (section 156 of Title 26), have no application and the remedy at law by payment of the exactions and suit for recovery is not adequate. Thome v. Lynch (D. C. Minn. 1921) 269 F. 995.

71. Forfeitures.—The statutes held to impose tax on illicit liquor, authorizing forfeiture proceedings on failure to pay tax. U. S. v. One Ford Coupé Automobile (Ala. 1926) 47 S. Ct. 154, 272 U. S. 321, 71 L. Ed. ——, 47 A. L. R. 1025.

Sections 1181 and 1182 of Title 26, Internal Revenue, authorizing forfeiture of vehicles for violation of revenue laws, when considered with this section, and sections 3, 40 and 53 of this title, held to authorize forfeiture of automobiles used in unlawful removal and concealment of intoxicating liquors on which no tax was paid. U. S. v. One Ford Automobile (D. C. Tenn. 1924) 2 F.(2d) 882.

§ 53. Assessment and collection of taxes and penalties.

All taxes and tax penalties provided for in section 52 of this chapter shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor. (Nov. 23, 1921, c. 134, § 5, 42 Stat. 223.)

Cross-References

The portions of the original text of this section omitted here are contained in sections 3 and 54 of this title.

Notes of Decisions

See, also, notes to sections 3 and 52 of this title.

1. Nature of tax.—Tax imposed on illegal manufacture of liquor by section 52 of this title, is not in fact a tax, but a penalty for the execution of which evidence of violation of section 46 of this title, is a condition precedent, notwithstanding this section, providing that such taxes and penalties shall be assessed and collected in same manner as other liquor taxes. Dukich v. Blair (D. C. Wash. 1925) 3 F.(2d) 302, appeal dismissed Blair v. Dukich (1926) 46 S. Ct. 469, 270 U. S. 670, 70 L. Ed. 791.

Penalty in addition to tax on illicit liquor held at least partly punitive and imposed in part for punishment of crime. Coffey v. Noel (D. C. Va. 1926) 11 F.(2d) 399.

2. Liability to tax.—This section and other statutes impose tax on illicit liquor, authorizing forfeiture proceedings on fail-

are to pay tax. U. S. v. One Ford Coupé Automobile (Ala. 1926) 47 S. Ct. 154.

3. Assessment and collection in general.—Penalties provided for violation of section 52 of this title, supplemented by Act Nov. 23, 1921 (incorporated in part in this section), may be assessed and collected by administrative officials in same manner as taxes to which they are incident, notwithstanding such penalties involve punishment, since taxpayer is given fair opportunity for hearing. Seligman v. Bowers (D. C. N. Y. 1925) 4 F.(2d) 1011, writ of error dismissed (1926) 46 S. Ct. 473, 271 U. S. 642, 70 L. Ed. 1127.

4. Distraint.—Administrative enforcement of the so-called taxes imposed by section 52 of this title, for the illegal manufacture of liquor by assessment and distraint proceedings against property, under this section, is violative of due process and denies the right of trial by jury guaranteed by Const. Amend. 6. Dukich v. Blair (D. C. Wash. 1925) 3 F.(2d) 302, writ of error dismissed Blair v. Dukich (1926) 46 S. Ct. 469, 270 U. S. 670, 70 L. Ed. 791.

§ 54. Loss of distilled spirits as affecting payment of tax thereon. If distilled spirits upon which the internal-revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to chapters 24 and 25 of Title 46, chapter 7 of Title 45, and sections 71 to 74, 76 to 78, and 141 of Title 49, or if lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the commissioner that such losses did not occur as the result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since October 28, 1919, or that may accrue hereafter. Nothing in this section* shall be construed as in any manner limiting or restricting the provisions of Chapter 3 of this title. (Nov. 23, 1921, c. 134, § 5, 42 Stat. 223.)

* "this section" should be "this section and sections 3 and 53 of this title."

Editorial comment.—The words "chapters 24 and 25 of Title 46" are a translation of the words "the Merchant Marine Act, 1920." The words "chapter 7 of Title 45, and sections 71 to 74, 76 to 78, and 141 of Title 49" are a translation of the words "the Transportation Act of 1920." The chapters and sections enumerated do not include all of the sections of either of the acts referred to in the original text. Whether the omissions affect the meaning of this section is not clear.

Cross-References

The portions of the original text of this section omitted here, will be found in sections 3 and 53 of this title.

Notes of Decisions

1. Theft as relieving from tax.—Brandy stolen from fortifying room of bonded winery, while it was locked and key held by government officer, held not taxable. Bauman v. Carter (D. C. Cal. 1926) 14 F.(2d) 118.

2. What constitutes bonded warehouse.—Test whether warehouse is bonded within this section, is whether government has taken control and exercises dominion over premises. Bauman v. Carter (D. C. Cal. 1926) 14 F.(2d) 118.

Fortifying room of bonded winery, which is place built for deposit, storage, and use of brandy when used to fortify wine, on which internal revenue tax has not been paid, held "distillery or other bonded warehouse," within this section, in view of Regulations 28, p. 1, Revision 1918 of Treasury Department, pp. 14, 43, par. (b), §§ 4, 5, 24, and section 361 of Title 26, Internal Revenue, so that brandy stolen therefrom while it was locked and key held by government officer was not taxable under section 447 of Title 26, Internal Revenue, since a "warehouse" is a structure used to store goods in, and "other bonded warehouses" are not limited to general warehouses provided for by sections 382–394 of Title 26, Internal Revenue. Id.

§ 55. Power of commissioner to compromise civil causes. The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this chapter before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced. (Oct. 28, 1919, c. 85, Title II, § 35, 41 Stat. 317.)

Cross-References

The portion of the original text of this section omitted here is contained in section 52 of this title.

§ 56. Limitation and regulation of importation, reimportation and manufacture of spirituous and vinous liquor. No spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous liquor, save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that in the opinion of the commissioner will, with liquor that may thereafter be manufactured and imported, be sufficient to supply the current need thereafter for all nonbeverage uses: *Provided*, That no vinous liquor shall be imported into the United States unless it is made to appear to the commissioner that vinous liquor for such nonbeverage use produced in the United States is not sufficient to meet such nonbeverage needs: *Provided further*, That the commissioner may authorize the return to the United States under such regulations and conditions as he may prescribe any distilled spirits of American production exported free of tax and reimported in original packages in which exported and consigned for redeposit in the distillery bonded warehouse from which originally removed. (Nov. 23, 1921, c. 134, § 2, 42 Stat. 222.)

Editorial comment.—Though the word "sufficient" in the eighth line of this section appeared in the original text, it has been suggested that it is inaccurate, and should be "insufficient." It would seem, however, that the word "insufficient" would also be inaccurate, and that the words "no more than sufficient" or "sufficient only" would more nearly express the intent of Congress.

Historical Note

Prior to its incorporation into the Code, this section contained a provision that the provision against importation should not apply to shipments en route to the United States at the time of the passage of the Act. This provision was evidently omitted as temporary and obsolete.

Cross-References

Portions of the original text of this section omitted here are incorporated in sections 15, 18, and 20 of this section.

Notes of Decisions

1. **Effect of Tariff Act.**—Tariff act of 1922 (chapter 3 of Title 19) Customs Duties, superseded provisions of any prior prohibition statute inconsistent therewith. Charles Zimmerman Sons Co. v. Ferguson (D. C. Mich. 1926) 16 F.(2d) 604, rehearing denied (1927) 18 F.(2d) 125.

2. **Importation in general.**—Importing liquor is unlawful in view of this section, and section 12 of this title. Ford v. U. S. (C. C. A. Cal. 1926) 10 F.(2d) 339, affirmed (1927) 47 S. Ct. 531.

3. **Power and authority of commissioner.**—Whether the existing supply of intoxicating liquor in domestic stock is sufficient to meet the non-beverage needs is a question of fact which is left by statute to the determination of the Commissioner of Internal Revenue. (1924) 34 Op. Atty. Gen. 103.

The Commissioner of Internal Revenue in considering applications for the importation of spirituous liquors may take into account only the quantity of existing do-

mestic supplies and not the kind or variety. Id.

Congress intended as to vinous liquors to leave an unrestricted field of inquiry for the purpose of maintaining the nice balance between excessive and legitimate importation of foreign wines to the sole discretion of the Commissioner of Internal Revenue. Id.

§ 57. Storage in or transportation to bonded warehouses of liquor already manufactured. Nothing herein shall prevent the storage in United States bonded warehouses of all liquor manufactured prior to the taking effect of this chapter, or prevent the transportation of such liquor to such warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited when the tax is paid, and permits may be issued therefor. (Oct. 28, 1919, c. 85, Title II,* 41 Stat. 318.)

* "§ 37" should be inserted in the credit after "Title II."

Cross-References

The portions of the original text of this section omitted here are incorporated in sections 58 to 60 of this title.

Notes of Decisions

1. Removal from warehouse in general.—Under National Prohibition Act (incorporated in this title), section 420 of Title 26, Internal Revenue, and regulations pursuant thereto, particularly section 914, and Pro-Circular No. 240 of August 21, 1923, after holder of warehouse receipts covering whisky has adjusted the "commercial arrangements" between him and proprietor of warehouse by payment of charges due, proprietor may not arbitrarily refuse to sign as consignor Form 1410–Revised, a condition precedent to removal from one concentration warehouse to another. Simon v. Frankfort Distillery (C. C. A. Ky. 1924) 2 F.(2d) 949.

2. Removal from warehouse to home.—See, also, notes to section 12 of this title.

Owner is not entitled to remove to his home liquor stored in warehouse in usual way, without any lease of any special room in the warehouse giving him exclusive possession and control of the liquor. McNally v. Jackson (D. C. La. 1925) 7 F. (2d) 373.

Const. Amend. 18, and the National Prohibition Act (incorporated in this title) construed as prohibiting the transporting of intoxicating liquor intended for beverage purposes from a bonded warehouse to the owner's residence, though the liquor was manufactured and lawfully acquired before the respective dates of their adoption, do not take from property its essential attributes, in violation of the Fifth Amendment. The provision of this section that nothing therein shall prevent the transportation of liquor to bonded warehouses or to any wholesale druggist for sale to such druggist for purposes not prohibited, permits transportation to bonded warehouses, but not from such warehouses, except when being transported to a wholesale druggist for sale to him for purposes not prohibited, especially in view of section 16 of this title, permitting distilled spirits to be withdrawn from such warehouses for denaturing or for deposit in a bonded warehouse. Corneli v. Moore (Mo. 1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332, affirming (D. C. 1920) 267 F. 456.

3. Forgery of permits.—To sustain conviction for conspiracy to obtain whisky from bond by forged permits and its subsequent sale, it was not necessary to prove that accused knew and participated in every action of every other conspirator, but it was sufficient to show that he agreed to take part in conspiracy. A. Guckenheimer & Bros. Co. v. U. S. (C. C. A. Pa. 1926) 3 F.(2d) 786, certiorari denied (1925) 45 S. Ct. 509, 268 U. S. 688, 69 L. Ed. 1157.

Evidence held sufficient to warrant conviction of federal prohibition agent for conspiring to obtain bonded whisky by forged permits and its subsequent sale and delivery. Id.

Where evidence in prosecution for conspiracy to obtain whisky from bond by forged permits and its unlawful sale showed that, if defendants did acts charged, they could not have believed permits were lawful, refusal to charge that, if any defendant did not know that deliveries were made on forged permits, finding of not guilty would be warranted, was not error. Id.

§ 58. Development of liquids to contain more than one-half of 1 per centum of alcohol; reduction of same. A manufacturer of any beverage containing less than one-half of 1 per centum of alcohol by

volume may, on making application and giving such bond as the commissioner shall prescribe, be given a permit to develop in the manufacture thereof by the usual methods of fermentation and fortification or otherwise a liquid such as beer, ale, porter, or wine, containing more than one-half of 1 per centum of alcohol by volume, but before any such liquid is withdrawn from the factory or otherwise disposed of the alcoholic contents thereof shall under such rules and regulations as the commissioner may prescribe be reduced below such one-half of 1 per centum of alcohol: *Provided*, That such liquid may be removed and transported, under bond and under such regulations as the commissioner may prescribe, from one bonded plant or warehouse to another for the purpose of having the alcohol extracted therefrom. And such liquids may be developed, under permit, by persons other than the manufacturers of beverages containing less than one-half of 1 per centum of alcohol by volume, and sold to such manufacturers for conversion into such beverages. The alcohol removed from such liquid, if evaporated and not condensed and saved, shall not be subject to tax; if saved, it shall be subject to the same law as other alcoholic liquors. Credit shall be allowed on the tax due on any alcohol so saved to the amount of any tax paid upon distilled spirits or brandy used in the fortification of the liquor from which the same is saved. (Oct. 28, 1919, c. 85, Title II, § 37, 41 Stat. 318.)

Cross-References

The portions of the original text of this section omitted here, are incorporated in sections 57, 59, and 60 of this title.

Notes of Decisions

1. Validity of regulations.—Section 4 of this title, which defines "liquor" and "intoxicating liquor," "provided that the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced if it contains less than one-half of 1 per centum of alcohol by volume and is made as prescribed in this section and is otherwise denominated than as beer, ale or porter," determines the scope of the act, and a beverage within the proviso is not within the purview of the act and cannot be brought within it by any "regulation" of the Commissioner of Internal Revenue therein authorized. Oertel Co. v. Gregory Dist. Atty. (D. C. Ky. 1921) 270 F. 789.

2. Right to permit.—Under this section all manufacturers of nonintoxicating beverages therein described are equally entitled to permits, if they come within the description of such section, and the Commissioner has no authority, under sections 14 and 16 of this title, to refuse a permit except in exercise of judicial discretion based on legal ground, as distinguished from absolute discretion based on personal judgment. Fred Feil Brewing Co. v. Blair (D. C. Pa. 1924) 2 F.(2d) 879.

3. Violation of permit.—It is violation of permit for manufacture of cereal beverages under this section to place beer in portable containers or store it in racking room before alcoholic content is reduced to legal limit. Seitz Brewing Co. v. Blair (D. C. Pa. 1926) 13 F.(2d) 946.

4. Forfeitures.—Under this section, permitting the manufacture of beer containing more than one-half of 1 per cent. of alcohol, but requiring its reduction below such percentage before withdrawal from the factory, the fact that a permittee, which was lessee of a brewery, allowed the withdrawal of beer without making such reduction, does not subject the brewery equipment, used in the manufacture and owned by the lessor, which was not a party to the unlawful act, to forfeiture under section 39 of this title. U. S. v. 3,510 Barrels, More or Less, of Beer (D. C. N. J. 1925) 3 F.(2d) 499.

§ 59. Tax on fortified wines for nonbeverage alcohol. When fortified wines are made and used for the production of nonbeverage alcohol, and dealcoholized wines containing less than one-half of 1 per

centum of alcohol by volume, no tax shall be assessed or paid on the spirits used in such fortification, and such dealcoholized wines produced under the provisions of this chapter, whether carbonated or not, shall not be subject to the tax on artificially carbonated or sparkling wines, but shall be subject to the tax on still wines only. (Oct. 28, 1919, c. 85, Title II, § 37, 41 Stat. 318.)

Cross-References

The portions of the original text of this section omitted here, are incorporated in sections 57, 58, and 60 of this title.

§ 60. Burden of proof as to alcoholic content. In any case where the manufacturer is charged with manufacturing or selling for beverage purposes any malt, vinous, or fermented liquids containing one-half of 1 per centum or more of alcohol by volume, or in any case where the manufacturer, having been permitted by the commissioner to develop a liquid such as ale, beer, porter, or wine containing more than one-half of 1 per centum of alcohol by volume in the manner and for the purpose herein provided, is charged with failure to reduce the alcoholic content of any such liquid below such one-half of 1 per centum before withdrawing the same from the factory, then in either such case the burden of proof shall be on such manufacturer to show that such liquid so manufactured, sold, or withdrawn contains less than one-half of 1 per centum of alcohol by volume. In any suit or proceeding involving the alcoholic content of any beverage, the reasonable expense of analysis of such beverage shall be taxed as costs in the case. (Oct. 28, 1919, c. 85, Title II, § 37, 41 Stat. 318.)

Cross-References

The portions of the original text of this section omitted here will be found in sections 57 to 59 of this title.

§ 61. Employees and equipment for enforcement of chapter; appointment and purchase; appropriation. The Commissioner of Internal Revenue and the Attorney General of the United States are hereby respectively authorized to appoint and employ such assistants, experts, clerks, and other employees in the District of Columbia or elsewhere, and to purchase such supplies and equipment as they may deem necessary for the enforcement of the provisions of this title, but such assistants, experts, clerks, and other employees, except such executive officers as may be appointed by the Commissioner or the Attorney General to have immediate direction of the enforcement of the provisions of this title, and persons authorized to issue permits, and agents and inspectors in the field service, shall be appointed under the rules and regulations prescribed by chapter 12 of Title 5: *Provided*, That the Commissioner and Attorney General in making such appointments shall give preference to those who have served in the military or naval service in the recent war, if otherwise qualified, and there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sum as may be required for the enforcement of this chapter including personal services in the District of Columbia. (Oct. 28, 1919, c. 85, Title II, § 38, 41 Stat. 319.)

Historical Note

Prior to its incorporation into the Code, this section contained a further provision making an appropriation for the fiscal year ending June 30, 1920. It was evidently omitted as temporary and obsolete.

Notes of Decisions

1. Appointment.—Commissioner of Internal Revenue is authorized to appoint such assistants as he may deem necessary for enforcement of the act. U. S. v. McConnell (D. C. Pa. 1926) 10 F.(2d) 973.

Under this section, prohibition officers and employees must, with certain exceptions, be appointed under the Civil Service Act (chapter 12 of Title 5, Executive Departments and Government Officers, and Employees) and Rules, and hence only such of them as must be so appointed are within the provisions of the Retirement Act (chapter 14 of Title 5, Executive Departments and Government Officers and Employees). (1920) 32 Op. Atty. Gen. 273.

2. Powers of agents.—See, also, notes to sections 11, 39, and 45 of this title.

Under this section prohibition agents, appointed by the Commissioner, though not "officers of the United States," within article 2, § 2, of the Constitution, may make arrests for violation of the National Prohibition Act (incorporated in this title). U. S. v. Daison (D. C. Mich. 1923) 288 F. 199.

Under Const. art. 2, § 2, and this section and other sections of this title, a prohibition agent, duly appointed by the Commissioner of Internal Revenue, may execute a search warrant. U. S. v. O'Conner (D. C. Ala. 1924) 294 F. 584.

Prohibition agents had the right to enter the premises of a brewery and examine the excisable products, to determine whether there was compliance with conditions of permit that brewery would not violate any of the provisions of the National Prohibition Act (incorporated in this title) or regulations promulgated thereunder, or any other laws of the United States respecting liquors, and could without a search warrant examine beer and seize it, where it contained more than one-half of 1 per cent. of alcohol, such seizure not being unreasonable under Const. Amend. 4, in view of this section and other sections. U. S. v. Westmoreland Brewing Co. (D. C. Pa. 1923) 294 F. 735, affirmed Westmoreland Brewing Co. v. U. S. (1923) 294 F. 740, and certiorari denied (1924) 44 S. Ct. 231, 263 U. S. 722, 68 L. Ed. 525.

Prohibition officer had power to arrest defendants, engaged in manufacturing liquor, after entry through premises not occupied by defendant in view of this section. Rouda v. U. S. (C. C. A. N. Y. 1926) 10 F.(2d) 916.

3. Actions or proceedings against employees.—A proceeding against a national prohibition agent, appointed under this section, for an alleged unlawful search, will not be removed from the state court to the federal court, under section 76 of Title 28, Judicial Code and Judiciary, providing for removal of suits and prosecutions against officers appointed under or acting by authority of the revenue laws, and on account of acts done under color of such laws, where it was not shown that there was any rational connection between the prohibition agent's appointment and his acts, and the customs or revenue laws of United States, for the prohibition law is penal in its nature. Morse v. Higgins (D. C. N. H. 1921) 273 F. 830.

But see decisions to the contrary under section 45 of this title.

4. Bribery of agents.—A prohibition agent for a designated district, appointed by the Commissioner of Internal Revenue under this section, has been held a person acting for the United States in an official function by authority of "a department or office of the government" within section 91 of Title 18, Criminal Code and Criminal Procedure, making it an offense to offer or give a bribe to any such person to influence his decision or action in any matter pending before him. Rembrandt v. U. S. (C. C. A. Ohio, 1922) 281 F. 122, certiorari denied (1922) 43 S. Ct. 93, 260 U. S. 731, 67 L. Ed. 486.

Conviction for offering and giving bribe to induce prohibition officer not to prosecute defendant under these sections, affirmed. Cohen v. U. S. (C. C. A. Ohio, 1923) 294 F. 488, certiorari denied (1924) 44 S. Ct. 333, 264 U. S. 584, 68 L. Ed. 861.

Indictment for bribery of prohibition agent, setting out allegation in general language of statute, held fatally defective. Boykin v. U. S. (C. C. A. Ala. 1926) 11 F. (2d) 484.

5. Offenses by officers and agents.—Prohibition director is not punishable under section 64 of Title 26, Internal Revenue, as person employed under "revenue law" or "revenue provisions of a law". U. S. v. McConnell (D. C. Pa. 1926) 10 F.(2d) 973.

Where prohibition agent's connection with conspiracy to extort money was clearly proved, improper cross-examination as to his relations with certain woman has been held not prejudicial. Apt v. U. S. (C. C. A. Mo. 1926) 13 F.(2d) 126.

§ 62. Summons to citizens whose property rights may be affected. In all cases wherein the property of any citizen is proceeded against

or wherein a judgment affecting it might be rendered, and the citizen is not the one who in person violated the provisions of the law, summons must be issued in due form and served personally, if said person is to be found within the jurisdiction of the court. (Oct. 28, 1919, c. 85, Title II, § 39, 41 Stat. 319.)

§ 63. Prohibition of intoxicating liquors in Canal Zone. It shall be unlawful to import or introduce into the Canal Zone, or to manufacture, sell, give away, dispose of, transport, or have in one's possession or under one's control within the Canal Zone, any alcoholic, fermented, brewed, distilled, vinous, malt, or spirituous liquors, except for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes, under regulations to be made by the President, and any such liquors within the Canal Zone in violation hereof shall be forfeited to the United States and seized: *Provided*, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad.

That each and every violation of any of the provisions of this section shall be punished by a fine of not more than $1,000 or imprisonment not exceeding six months for a first offense, and by a fine not less than $200 nor more than $2,000 and imprisonment not less than one month nor more than five years for a second or subsequent offense.

That all offenses heretofore committed within the Canal Zone may be prosecuted and all penalties therefor enforced in the same manner and to the same extent as if this chapter had not been passed. (Oct. 28, 1919, c. 85, Title III, § 20, 41 Stat. 322.)

Notes of Decisions

1. Operation and effect of section in general.—Const. Amend. 18, prohibiting the transportation of intoxicating liquors, and section 12 of this title, liberally construed under the terms of the act, prohibit the transportation of intoxicating liquor across the United States from Canada to Mexico, or the transshipment of such liquor from one British ship to another, while within a port of the United States, notwithstanding R. S. § 3005, as amended (repealed), permitting merchandise arriving in any domestic port destined to a foreign port to be conveyed through the territory of the United States without payment of duties, and article 29 of the Treaty with Great Britain of May 8, 1871, permitting merchandise arriving at certain ports destined to British possessions in North America to be conveyed across the United States without payment of duties, especially in view of the express permission by this section for transportation through the Canal Zone. Grogan v. Hiram Walker & Sons (Mich. 1922) 42 S. Ct. 423, 259 U. S. 80, 66 L. Ed. 836, 22 A. L. R. 1116, reversing Hiram Walker & Sons v. Lawson (D. C. 1921) 275 F. 373.

§ 64. Effect of partial invalidity of chapter. If any provision of this chapter* shall be held invalid it shall not be construed to invalidate other provisions of the chapter.* (Oct. 28, 1919, c. 85, Title II, § 36, 41 Stat. 318.)

* The words "this chapter" and "the chapter" are translations of the words "this Act" and "the Act" in the original text, and are not sufficiently broad. They should either be changed to "this title" and "the title" or the sections taken from the National Prohibition Act should be enumerated.

Decisions Relating to Subject in General

I. Decisions under the Wilson Act

1. Purpose and validity.
2. Application and operation in general.
3. State regulation of interstate commerce in general.
4. —— Application of state laws in general.
5. —— State police regulation in general.
6. —— State inspection laws.
7. —— State prohibitory laws.

8. —— State license taxes and revenue laws.
9. Original package.
10. Arrival in state.
11. Solicitation of orders.
12. Importation prior to act.

II. Decisions under Webb-Kenyon Act

21. Character of liquor as interstate commerce in general.
22. Power of Congress.
23. Validity of statute.
24. Purpose of statute.
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26. Repeals.
27. Divestiture of interstate character and subjection to state laws.
28. Seizure and condemnation.
29. Acts and things prohibited.
30. State legislation—In general.
31. —— Validity and effectiveness.
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III. Decisions under the Reed Amendment

Validity, Construction and Operation

51. Validity.
52. Effect on other federal statutes.
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55. Acts and things prohibited—In general.
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V. Decisions under National Prohibition Act, Title I

131. Constitutionality.
132. Expiration of effective force of provisions.
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VI. Decisions under Revenue Act 1917, § 301 (repealed)

151. Wines, vermuth, ginger cordial.
152. Importation for other than beverage purposes.
153. Spirits produced in West Indian Islands.
154. Alcohol brought from Porto Rico.
155. Forfeiture of spirits.

VII. Decisions under Revenue Act 1918, § 601

171. Smuggling.

I. DECISIONS UNDER THE WILSON ACT

For the text of the Wilson Act (Act Aug. 8, 1890, c. 728, 26 Stat. 313) apparently omitted from the Code as superseded, see the historical note to section 1 of this title.

1. Purpose and validity.—The act is within the power of Congress. In re Rahrer (Kan. 1891) 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572, reversing (C. C 1890) 43 F. 556, 10 L. R. A. 444; In re Spickler (C. C. Iowa, 1890) 43 F. 653, 10 L. R. A. 446; In re Van Vliet (C. C. Ark. 1890) 43 F. 761, 10 L. R. A. 451. See, also, Adams Exp. Co. v. Commonwealth of Kentucky (Ky. 1915) 35 S. Ct. 824, 826, 238 U. S. 190, 59 L. Ed. 1267; U. S. Exp. Co. v. Friedman (Ark. 1911) 191 F. 673, 112 C. C. A. 219; Com. v. Calhane (1891) 154 Mass. 115, 27 N. E. 881; State v. Fraser (1891) 1 N. D. 425, 48 N. W. 343. See Schollenberger v. Pennsylvania (Pa. 1898) 171 U. S. 1, 18 S. Ct. 757, 43 L. Ed. 49; Shoshone Min. Co. v. Rutter (Idaho, 1900) 177 U. S. 505, 20 S. Ct. 726, 44 L. Ed. 864.

The purpose of Congress in enacting this statute was to allow state laws to operate upon intoxicating liquor shipped from one state into another notwithstanding it remains in the original package. In re Rahrer (Kan. 1891) 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572; Rhodes v. Iowa (Iowa, 1898) 170 U. S. 412, 18 S. Ct. 664,

42 L. Ed. 1088; Vance v. W. A. Vandercook Co. (S. C. 1898) 170 U. S. 438, 18 S. Ct. 674, 42 L. Ed. 1100; Lottery Case (Ill. 1903) 188 U. S. 321, 23 S. Ct. 321, 47 L. Ed. 492; Jervey v. The Carolina (D. C. S. C. 1895) 66 F. 1013; Minneapolis Brewing Co. v. McGillivray (C. C. S. D. 1900) 104 F. 258; In re Bergen (C. C. Kan. 1900) 115 F. 339; Fred Miller Brewing Co. v. Stevens (1897) 102 Iowa, 60, 71 N. W. 186.

The effect of this law is to subject to the operation of the police power of the state certain subjects which were theretofore excluded from its operation by reason of their being subjects of interstate commerce; and it is not a delegation to the states of the power to regulate commerce, nor an adoption of state laws as such regulation. Wilkerson v. Rahrer (Kan. 1891) 11 S. Ct. 865, 140 U. S. 545, 35 L. Ed. 572, reversing In re Rahrer (C. C. 1890) 43 F. 556, 10 L. R. A. 444.

The purpose of the act was to allow state regulations to operate on the sale of liquor coming from other states. Meyer, Jossen & Co. v. Mobile (C. C. Ala. 1906) 147 F. 843.

The Wilson Law is not a delegation, but an exercise, of the power of Congress to regulate commerce between the states, and it subjects intoxicating liquors from other states in the original packages to the laws of this state enacted before its passage. State v. Fraser (1891) 1 N. D. 425, 48 N. W. 343.

This legislation was enacted to minimize or remove the effects of a decision of the Supreme Court of the United States theretofore recently rendered to the effect that, under the commerce clause of the federal Constitution, a vendor could not only import whisky from one state to another, notwithstanding the prohibition laws of the latter state, but could sell it there in the original package. The statute has been declared a constitutional enactment with the limitation that it does not operate to restrain or affect a continuous shipment of whisky from a vendor in one state to a vendee in another, and there delivered to such vendee in the original package; this being the case now presented for consideration. State v. Allen (1912) 161 N. C. 226, 75 S. E. 1082.

2. Application and operation in general.—Where alcoholic liquors, imported from a foreign country, were stored in New York, their transmission to New Orleans was a transportation within this act, and not an importation, though the storing in New York was only temporary and the liquors were originally intended for New Orleans. State v. Frederick De Bary & Co. (1912) 58 So. 892, 130 La. 1090, affirmed Frederick De Bary & Co. v. State (1913) 33 S. Ct. 239, 227 U. S. 108, 57 L. Ed. 441.

The act confers no right on one to sell in the state intoxicating liquors shipped to him from another state. State v. Spence (1910) 53 So. 596, 127 La. 336.

This statute rendered existing state laws operative upon liquor in the original packages, and it was unnecessary for the states to enact new laws in order to render the statute operative. In re Rahrer (Kan. 1891) 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572, reversing (C. C. 1890) 43 F. 556; Emert v. Missouri (Mo. 1895) 156 U. S. 296, 15 S. Ct. 367, 39 L. Ed. 430; In re Spickler (C. C. Iowa, 1890) 43 F. 653; In re Van Vliet (C. C. Ark. 1890) 43 F. 761; In re Jordan (D. C. Iowa, 1892) 49 F. 238; Tinker v. State (1890) 90 Ala. 638, 8 So. 814; Fred Miller Brewing Co. v. Stevens (1897) 102 Iowa, 60, 71 N. W. 186; Com. v. Gagne, 153 Mass. 205, 26 N. E. 449, 10 L. R. A. 442; State v. Fraser (1891) 1 N. D. 425, 48 N. W. 343; State v. Lord (1891) 66 N. H. 479, 29 A. 556; Starace v. Rossi (1897) 69 Vt. 303, 37 A. 1109.

Sales before the enactment were not affected by the statute. In re Rahrer (1891) 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572; Wind v. Iler (1895) 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219; Carstairs v. O'Donnell (1891) 154 Mass. 357, 28 N. E. 271; Durkee v. Moses (1891) 67 N. H. 115, 23 A. 793; Doherty v. Cotter (1894) 68 N. H. 37, 38 A. 499; Jones v. Sanborn (1894) 68 N. H. 602, 40 A. 393.

In reason it is certain that the purpose which led to the enactment of the law was to give the several states power to deal with all liquors coming from outside their limits upon arrival and before sale, thus rendering the state police authority more complete and efficacious on the subject; a purpose which would be plainly set at naught by exempting liquors brought into a state from a foreign country from the operation of the statute. DeBary v. Louisiana (La. 1913) 227 U. S. 108, 33 S. Ct. 239, 57 L. Ed. 441.

3. State regulation of interstate commerce in general.—That feature of state constitutional amendments and statutory enactments which undertakes to make it a crime to introduce or attempt to introduce intoxicating liquors into a state, under the federal decisions, pertains to commerce, the regulation of which, between the states, is exclusively lodged in Congress. It has been held uniformly by the courts that intoxicating liquors are subjects of interstate commerce to be regulated by congressional legislation and exempt from state interference. Leisy v. Hardin (Iowa, 1890) 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128; Louisville, etc., R. Co. v. F. W. Cook Brewing Co. (Ind. 1912) 223 U. S. 70, 32 S. Ct. 189, 56 L. Ed. 355. Until 1890, when the Wilson Act was passed, the interstate character of intoxicating liquors had been treated and considered as that of other commodities of interstate traffic. Thus it has been held that a state prohibition law did not reach or affect intoxicating liquors as long as they

remained in the original package. Leisy v. Hardin (Iowa, 1890) 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128. The Wilson Act worked a radical change in the law and therefore those decisions rendered by the United States courts prior to its enactment are no longer applicable. Under the Wilson Act, intoxicating liquors when imported into one state from another, immediately upon delivery to the consignee, whether in the original package or not, become subject to the law of the state. Delamater v. South Dakota (S. D. 1907) 205 U. S. 93, 27 S. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733.

Under this act the question whether a given state law is a lawful exercise of the police power is open to the Supreme Court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid, or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot, under that act, establish a system which in effect discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful. Scott v. Donald (S. C. 1897) 17 S. Ct. 265, 272, 165 U. S. 58, 41 L. Ed. 632.

So state statutes discriminating against foreign and in favor of domestic dealers are void notwithstanding the Wilson Act. Minneapolis Brewing Co. v. McGillivray (C. C. S. D. 1900) 104 F. 258; Pabst Brewing Co. v. Crenshaw (C. C. Mo. 1903) 120 F. 144, affirmed (1905) 25 S. Ct. 552, 198 U. S. 17, 49 L. Ed. 925; Vance v. W. A. Vandercook Co. (S. C. 1898) 170 U. S. 438, 18 S. Ct. 674, 42 L. Ed. 1100; Indianapolis v. Bieler (1893) 138 Ind. 30, 36 N. E. 857; People v. Voorhis (1902) 131 Mich. 398, 91 N. W. 624; Stevens v. State (1899) 61 Ohio St. 597, 56 N. E. 478; State v. Holleyman (1898) 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567. See, also, Reymann Brewing Co. v. Brister (Ohio, 1900) 179 U. S. 445, 21 S. Ct. 201, 45 L. Ed. 269; Cantini v. Tillman (C. C. S. C. 1893) 54 F. 969.

This act attaches to liquor which is the subject of interstate commerce only after the shipment has been consummated by the arrival of the goods at their destination and their delivery to the consignee, and a state law which makes the carrier liable to a penalty for transporting such goods within the state before their delivery, except in cases where a certificate has been obtained from state authorities, is void. Rhodes v. Iowa (Iowa, 1898) 18 S. Ct. 664, 666, 170 U. S. 412, 42 L. Ed. 1088, reversing State v. Rhodes (1894) 90 Iowa, 496, 58 N. W. 887, 24 L. R. A. 245.

A state cannot forbid the importation of intoxicating liquors, either under this act or independently thereof; and one who merely brings barrels of liquor into a port of South Carolina, and unloads them on the dock, cannot be punished under the state "dispensary" law. Ex parte Edgerton (C. C. S. C. 1893) 59 F. 115.

A fortiori, one who brings liquors into a port without unloading them is not punishable. Ex parte Jervey (C. C. S. C. 1895) 66 F. 957. See, also, Jervey v. The Carolina (D. C. S. C. 1895) 66 F. 1013.

The purpose of the act was to place liquors which have been transported into a state as subjects of interstate commerce, on their arrival therein, on an exact equality, so far as relates to the right to sell the same, with liquors manufactured in the state; and to that extent only did congress, by such act, give its consent that the state might, in the exercise of its police powers, impose regulations and restrictions upon the sale of such liquors in the original packages. Minneapolis Brewing Co. v. McGillivray (C. C. S. D. 1900) 104 F. 258.

This Act does not authorize the enactment by a state of a law restricting the right of an interstate carrier to deliver the imported package to its consignee. Crescent Liquor Co. v. Platt (C. C. W. Va. 1906) 148 F. 894. See further In re Rahrer, (Kan. 1891) 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572; Rhodes v. Iowa (Iowa, 1898) 170 U. S. 412, 18 S. Ct. 664, 42 L. Ed. 1088; In re Langford (C. C. S. C. 1893) 57 F. 575; Ex parte Edgerton (C. C. S. C. 1893) 59 F. 115; Jervey v. The Carolina (D. C. S. C. 1895) 66 F. 1019; State v. Lord (1891) 66 N. H. 479, 29 A. 556; Corbin v. McConnell (1902) 71 N. H. 350, 52 A. 447.

Intoxicating liquors lawfully sold in good faith in one state may be lawfully delivered to the purchaser in another state, and the carrier and means employed in such carriage are entitled to protection from interference by the state authorities as instruments of interstate commerce. Kansas City Breweries Co. v. Trickett (C. C. Kan. 1907) 155 F. 840.

Intoxicating liquors transported from another state to a point in Kansas are subject to the laws of Kansas relating to their sale to the same extent as are other intoxicating liquors already rightfully in the state, and cannot be sold at the place of destination, in the original packages or other form, except as the laws of the state prescribe. The police power of the state, so exercised does not infringe on the power delegated to congress to regulate commerce between the states. State v. Fulker (1890) 43 Kan. 237, 22 P. 1020, 7 L. R. A. 183.

R. S. Me. § 56, even when applied to liquors brought from another state for sale in this state, is not in violation of the congressional power to regulate commerce, and moreover, was not invalid prior to the act. Knowlton v. Dougherty (1895) 87 Me. 518, 33 A. 18, 47 Am. St. Rep. 349.

Where a sale of whisky is consummated in another state by order of one who as agent for a buyer sends the order from a

place in the state where such sale is prohibited, the commerce clause of the federal Constitution will protect him from indictment. State v. Allen (1912) 75 S. E. 1082, 161 N. C. 226.

Congress has exclusive power to fix the time when an interstate shipment of intoxicating liquor loses its interstate character and becomes subject to state control. McCord v. State (1909) 101 P. 280, 2 Okl. Cr. 214.

The provisions of Act Pa., May 13, 1887 (P. L. 108), entitled "An act to restrain and regulate the sale of vinous and spirituous malt or brewed liquors, or any admixture thereof," are not a direct burden on interstate commerce in intoxicating liquors as regulated by Congress in this act. Commonwealth v. Rossi (1913) 53 Pa. Super. Ct. 210.

Acts Tenn. 1913, 2d Extra Sess. c. 1, § 5, prohibiting the delivery by carrier of an interstate shipment of liquor without receiving a certain statement from the consignee, held invalid as a direct interference with interstate commerce, and not to be sustained as an exercise of the police power, or within the Wilson Act. Palmer v. Southern Exp. Co. (1914) 165 S. W. 236, 129 Tenn. 116.

Interstate Commerce Act (chapter 1 of Title 49, Transportation), this act, and sections 388 and 389 of Title 18, Criminal Code and Criminal Procedure regulate interstate commerce in intoxicating liquors, to the exclusion of state action, and a state law relating to the same subject has been held invalid, so far as it regulates interstate commerce. Id.

This act does not confer upon any state power to prohibit the importation of such liquors by any one except certain officers appointed by the state. Mr. Justice Brown dissenting. Scott v. Donald (S. C. 1897) 17 S. Ct. 265, 272, 165 U. S. 58, 41 L. Ed. 632.

"After the adoption of the prohibition and local option laws by many of the states of the Union, unscrupulous persons sought to take an improper advantage of the interstate commerce clause of the Constitution of the United States, and under the authority thereof would ship into such states for the use of the consumer, intoxicating liquors in what was known as the 'original package,' and thereby violate the spirit, if not the letter, of said prohibition and local option laws. Under that status of the law, neither the courts of justice nor other state officials had sufficient authority to effectively remedy the many abuses before suggested. The courts, when confronted with that condition of things, frequently suggested that relief from that situation might be granted by an act of Congress. Interested parties grasping the suggestion urged upon Congress the importance and necessity of such an act. In consequence thereof the Wilson act was duly enacted. From this brief history of that act, it must be apparent that Congress never designed thereby to authorize the legislature of a state to enact laws materially interfering with interstate commerce, but only intended to remove the shield under which the state laws were being violated by those designing persons, with impunity; or, in other words, the clear intention of Congress was to subject intoxicating liquor shipped from one state into another to the laws of the state to which it was shipped, and thereby subject both foreign and domestic liquors to the same law, but nothing more." State v. Parker Distilling Co. (1911) 237 Mo. 103, 139 S. W. 453.

By this Act the liquor traffic was expressly eliminated as one of the subjects of interstate commerce, and is therefore not within the protection of the Federal Constitution. In construing the Act, the state courts of those jurisdictions where the question has been raised, and the Supreme Court of the United States, have held that it means, as its language will be found, upon examination, to plainly imply, that a state may, in the exercise of its police powers, and without offending the commerce clause of the Federal Constitution, regulate or control the traffic in intoxicating liquors, within its own borders, to the extent either of regulating or altogether preventing the business of soliciting proposals in such state for the purchase of such liquors, which proposals are to be consummated outside of the state, and the liquors to which such proposals relate are also situated outside the state. In re Anixter (1913) 22 Cal. App. 117, 134 P. 193. This Act removed all limitations upon the powers of the states to regulate or prohibit all sales, contracts, and other acts and transactions relating to intoxicating liquors, occurring wholly within their territorial jurisdictions. State v. Spence (1910) 127 La. 336, 53 So. 596; State v. Miller (1909) 66 W. Va. 436, 66 S. E. 522, 19 Ann. Cas. 604.

A state statute prohibiting a carrier from carrying intoxicating liquors into any county or district therein where the sale of such liquors is prohibited by law, as applied to shipments from other states, is void as an attempted regulation of interstate commerce, and affords no justification for the refusal of a railroad company, although a corporation of such state, to receive and carry such shipments. Louisville, etc., R. Co. v. F. W. Cook Brewing Co. (Ind. 1909) 172 F. 117, 96 C. C. A. 322, affirmed (1912) 223 U. S. 70, 32 S. Ct. 189, 56 L. Ed. 355.

The federal Supreme Court in its decision in Heyman v. Southern R. Co. (Ga. 1906) 203 U. S. 270, 27 S. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130, authoritatively settled the following doctrines: (a) Prior to the Wilson Act, in case of interstate shipment of intoxicating liquors, delivery and

sale in the original package was necessary to terminate interstate commerce, so far as the police regulations of the states were concerned. (b) The Wilson Act did not delegate to the states the right to forbid the transportation of merchandise from one state to another, but "it merely provided in the case of intoxicating liquors that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original package." (c) The state statute must permit the delivery of the liquors to the party to whom they were consigned within the state, but after such delivery the state has power to prevent the sale of the liquors, even in the original package. (d) The question of whether the liability of the carrier, as such, has ceased, under the state laws, and has become that of a warehouseman, is immaterial. (e) But the court reserved its opinion upon the question whether, if the consignee, after notice and full opportunity to receive the liquors, designedly leaves them in the hands of the carrier for an unreasonable time, they should not be held to have come under the provisions of the Wilson Act, because constructively delivered.

A state statute cannot deprive a citizen of the right to import liquor into the state, since the state law does not become operative until delivery. Vance v. W. A. Vandercook Co. (S. C. 1898) 170 U. S. 438, 18 S. Ct. 674, 42 L. Ed. 1100; Scott v. Donald (S. C. 1897) 165 U. S. 58, 17 S. Ct. 265, 41 L. Ed. 632, affirming (1895) 76 F. 559; Ex parte Loeb (C. C. S. C. 1896) 72 F. 657. See, also, In re Bergen (C. C. Kan. 1900) 115 F. 339; Jervey v. The Carolina (D. C. S. C. 1895) 66 F. 1019, holding that the decision in Bowman v. Chicago, etc., R. Co. (Ill. 1888) 125 U. S. 465, 8 S. Ct. 689, 1062, 31 L. Ed. 700, was unaffected by the "Wilson Act." State v. Hanaphy (1902) 117 Iowa, 15, 90 N. W. 601; State v. Wade (1890) 63 Vt. 80, 22 A. 12. Contra, Starace v. Rossi (1897) 69 Vt. 303, 37 A. 1109.

The South Carolina Dispensary Act of March 5, 1897, amending the Act of March 6, 1890, No. 61, is unconstitutional in so far as it compels any resident of the state who desires to order alcoholic liquor for his own use first to communicate his purpose to a state chemist, and in so far as it deprives any nonresident of the right to ship by means of interstate commerce any liquor into South Carolina unless previous authority is obtained from the officers of that state. It subjects the constitutional right of the nonresident to ship into the state, and of a resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of rights which the statute itself acknowledges. Scott v. Donald (S. C. 1897) 165 U. S. 58, 17 S. Ct. 266, 41 L. Ed. 632; Vance v. W. A. Vandercook Co. (S. C. 1898) 170 U. S. 438, 18 S. Ct. 674, 42 L. Ed. 1100. See also Cantini v. Tillman (C. C. S. C. 1893) 54 F. 969; Jervey v. The Carolina (D. C. S. C. 1895) 66 F. 1013.

A state statute forbidding a person to whom intoxicating liquor has been consigned to give to any other person an order upon the carrier for it, with the purpose of enabling him to receive it for himself, is not invalid as involving an undue interference with interstate commerce. For while the Wilson Act does not give the local authorities absolute jurisdiction of intoxicating liquors shipped into the state until they are delivered to the consignee, it does affect the rights of the parties to an interstate transaction prior to such delivery. Danciger v. Cooley (1916) 98 Kan. 38, 157 P. 453, rehearing denied (1916) 158 P. 1119, 98 Kan. 484, affirmed (1919) 39 S. Ct. 119, 248 U. S. 319, 63 L. Ed. 266.

It would be repugnant to the plain spirit of the statute to hold that the state has no power to prevent one who has shipped in liquor consigned to himself, from giving an order to the carrier to deliver it to someone else. Id.

There is nothing in the Wilson Act which authorizes the state of West Virginia to interfere with the shipment and delivery of liquors ordered by a citizen of that state for his own personal use from a licensed wholesale dealer without the state. Taylor v. Com. (1915) 117 Va. 909, 85 S. E. 499.

4. —— Application of state laws in general.—An importer can sell only on terms prescribed by local statute. Reymann Brewing Co. v. Brister (Ohio 1900) 179 U. S. 445, 21 S. Ct. 201, 45 L. Ed. 269; Vance v. W. A. Vandercook Co. (S. C. 1898) 170 U. S. 438, 18 S. Ct. 674, 42 L. Ed. 1100; In re Rahrer (Kan. 1891) 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572; Minneapolis Brewing Co. v. McGillivray (C. C. S. D. 1900) 104 F. 258; Indianapolis v. Bieler (1893) 138 Ind. 30, 36 N. E. 857; Com. v. Calhane (1891) 154 Mass. 115, 27 N. E. 881; People v. Voorhis (1902) 131 Mich. 398, 91 N. W. 624; State v. Bixman (1901) 162 Mo. 1, 62 S. W. 828; State v. Lord (1891) 66 N. H. 479, 29 A. 556.

A bond given by a local agent to account for sales within the state is subject to the laws of the state. Fred Miller Brewing Co. v. Stevens (1897) 102 Iowa 60, 71 N. W. 186; New Iberia v. Erath (1907) 118 La. 305, 42 So. 945.

Intoxicating liquor imported into a state for a citizen's own use is subject to the laws of such state. State v. Aiken (1894) 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345.

Under the Wilson Law and the Webb-Kenyon Act (omitted from Code as superseded) sale of liquors received from

other states to purchasers outside the state have been held subject to state laws (Acts Tenn. 1909, c. 1, § 1). Laughter & Fisher v. McLain (D. C. Tenn. 1916) 229 F. 280.

Code W. Va. 1899, c. 32 (Code 1906, §§ 913–1063), relating to sales in the state of intoxicating liquors, as amended and re-enacted since the date of this act, apply to retail dealings in intoxicating liquors wholly within the state by nonresidents, as well as residents. State v. Miller (1909) 66 S. E. 522, 66 W. Va. 436.

5. —— State police regulation in general.—The act merely subjects liquors brought into a state to the police power thereof while still in the original packages, and gives the state no authority to punish persons who bring liquors into a port of a state without attempting to unload them. Ex parte Jervey (C. C. S. C. 1895) 66 F. 957; Jervey v. The Carolina (D. C. S. C. 1895) 66 F. 1013.

The act goes no further than to permit the police laws of a state to be applied to liquors which have been shipped into the state as an article of interstate commerce after such liquors have reached the end of the shipment and have been delivered to the consignee. In re Bergen (C. C. Kan. 1900) 115 F. 339.

An interstate shipment of intoxicating liquor cannot be seized and confiscated under the state Enforcing Act either before or after the same has been removed from the carrier's premises to the consignee's residence, if intended for his personal use or that of his family. State v. Eighteen Casks of Beer (1909) 104 P. 1093, 24 Okl. 786, 25 L. R. A. (N. S.) 492.

The act removed all limitations on the powers of the state to regulate or prohibit sales, contracts, and other transactions relating to intoxicating liquors within their territorial limits. State v. Miller (1909) 66 S. E. 522, 66 W. Va. 436.

Any person within that portion of the state which formerly comprised Oklahoma Territory may purchase in another state, and have delivered at his residence or place of business for his personal use or use of his family, intoxicating liquors free from interference of state law. Walker v. State (1912) 127 P. 895, 11 Okl. Cr. 339.

6. —— State inspection laws.—Interstate commerce in intoxicating liquors is not unlawfully burdened by an inspection law enacted by a state "in the exercise of its police powers," because the statute does not provide for an adequate inspection, and imposes a burden beyond the cost of inspection. Pabst Brewing Co. v. Crenshaw (Mo. 1905) 198 U. S. 19, 25 S. Ct. 552, 49 L. Ed. 925.

A state statute imposing an inspection fee upon beer or other malt liquors shipped from other states into that state, and held there for sale and consumption therein, must, although producing a revenue, and not providing for an adequate inspection, be deemed enacted by the state "in the exercise of its police powers," within the meaning of this act where the highest state court has upheld as a valid police regulation so much of the statute as imposes the same fee on beer of domestic manufacture over the objection that it is a revenue measure, and not an inspection law. Id.

An inspection law enacted by a state "in the exercise of its police powers," within the meaning of this act, is not void as an interference with interstate commerce because it operates to deter shipments into the state. Id.

Under this section, Act May 4, 1899 (Laws Mo. 1899, p. 228), prohibiting the sale of beer or malt liquors till the same are inspected, and the fee therefor paid to the state, is not in violation of the rights of interstate commerce. State v. Bixman (1901) 162 Mo. 1, 62 S. W. 828. See, also, Delamater v. South Dakota (S. D. 1907) 205 U. S. 93, 27 S. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733.

7. —— State prohibitory laws.—The decisions of the Supreme Court of the United States that the state prohibitory laws were not operative on liquors imported and sold in the original packages did not have the effect to annul those laws, and hence their re-enactment was not necessary in order to make them immediately operative upon such liquors after the passage of the "Wilson Bill." Wilkerson v. Rahrer (Kan. 1891) 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572, reversing In re Rahrer (C. C. 1890) 43 F. 556, 10 L. R. A. 444; Commonwealth v. Calhane (1891) 154 Mass. 115, 27 N. E. 881; State v. Lord (1891) 66 N. H. 479, 29 A. 556.

Under this act a state in the exercise of its police power may lawfully prohibit the advertising within the state of intoxicating liquors sold or kept for sale without the state. State v. J. P. Bass Pub. Co. (1908) 71 A. 894, 104 Me. 288, 20 L. R. A. (N. S.) 495; State v. State Capital Co. (1909) 103 P. 1021, 24 Okl. 252.

The South Carolina state dispensary statute is within the police power and within the purview of this act. Murray v. Wilson Distilling Co. (S. C. 1909) 29 S. Ct. 458, 459, 213 U. S. 151, 53 L. Ed. 742.

The act subjects liquor shipped into a state to the operation of its prohibitory laws previously passed. In re Van Vliet (C. C. Ark. 1890) 43 F. 761, 10 L. R. A. 451.

In view of this section, the South Carolina Act of December 24, 1892, prohibiting the manufacture and sale of intoxicating liquors, does not contravene Const. art. 1, § 10, forbidding the states to pass any laws impairing the obligation of contracts. Cantini v. Tillman (C. C. S. C. 1893) 54 F. 969.

The sale of beer as a beverage, in any quantity, whether by the manufacturer or not, is prohibited in a township where the people have availed themselves of the local option law, passed March 3, 1888 (85 Ohio Laws, p. 55); and, being a police regulation, a sale of an unbroken package, made in such township by an agent of a manufacturer located in another state, is not protected from the operation of the law on the ground that it interferes with interstate commerce, such police power being conferred on the states by this act. Stevens v. State (1900) 56 N. E. 478, 61 Ohio St. 597.

This act, having reference only to liquors brought into a state, making them immediately subject to the laws of that state enacted in the exercise of its police power, independent of the question of interstate commerce, does not affect the question of a sale in one state, completed, by delivery in that state of the liquor to a common carrier to transport to another state to the person who ordered it from there by mail, being within the protection of the interstate commerce clause of the Constitution, as against the law of the state in which the sale was made, making it an offense to sell intoxicating liquor. State v. J. W. Kelly & Co. (1911) 133 S. W. 1011, 123 Tenn. 556, 36 L. R. A. (N. S.) 171.

A state law forbidding the advertising of liquors for sale in the state, when construed to apply to a nonresident liquor dealer sending advertising matter into the state held valid in view of this act and the Webb-Kenyon Act (omitted as superseded). State v. Davis (1915) 87 S. E. 262, 77 W. Va. 271, L. R. A. 1917C, 639.

Intoxicating liquors offered for sale in the original packages of importation in a city where the sale of such liquors is prohibited by a valid ordinance are subject, under this act to the provisions of such ordinance, and may be seized by the authorities. Bailey Liquor Co. v. Austin (C. C. S. C. 1897) 82 F. 785.

Const. (Bunn's Ed.) Okl. § 499, prohibiting the conveyance of intoxicating liquor from one place within the state to another therein, in absence of prohibitory legislation, is not within the scope and operation of this act. High v. State (1909) 101 P. 115, 2 Okl. Cr. 161, 28 L. R. A. (N. S.) 162.

By this section, state prohibitions of intoxicating liquor may affect otherwise lawful sale of imported liquor in original packages. Theo. Hamm Brewing Co. v. Chicago, R. I. & P. Ry. Co. (C. C. A. Ill. 1917) 243 F. 143, 156 C. C. A. 9.

8. —— State license taxes and revenue laws.—In Rossi v. Pennsylvania (Pa. 1915) 238 U. S. 62, 35 S. Ct. 677, 59 L. Ed. 1201, the court said: "Plaintiff in error was convicted in the Court of Quarter Sessions of Lawrence county, in the state of Pennsylvania, of the crime of selling intoxicating liquors in that county without a license, contrary to § 15 of an act of May 13, 1887 (P. L. p. 113), which declares: 'Any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced," etc. The Superior Court affirmed the conviction ([1913] 53 Pa. Super. Ct. 210), the Supreme Court of the state refused an appeal, and this writ of error was allowed. The facts are these: Plaintiff in error is a liquor dealer having his place of business in the county of Mahoning, in the state of Ohio, which immediately adjoins Lawrence county, Pennsylvania. He had no license to sell in Lawrence county, nor any place of business there, but went into that county and there took an order for liquor, with the understanding that the liquor should be thereafter delivered from his stock in Ohio to the residence of the purchaser in Pennsylvania. He returned to Ohio, there loaded the goods upon his own wagon, and either by himself or his employee drove across the state line and delivered the liquor to the residents of the purchaser, pursuant to the contract. Thus the sale was negotiated in Pennsylvania, but contemplated and required for its fulfillment a transaction in interstate commerce which afterwards took place, with resulting delivery in Pennsylvania. The charge, as will be observed, was selling, not offering for sale. And it is admitted that by the Pennsylvania decisions the act of taking orders for future delivery is not punishable under the statute cited, or any other, and that it is not the making of an executory contract, but the executed sale that is punishable. * * * And so, in the present case, the superior court ([1913] 53 Pa. Super. Ct. 220), recognized that it was not the making of the executory contract, but the execution of it, that involved a violation of the law of the state. The federal question presented is whether, under the Act of Congress approved August 8, 1890, chap. 728 (26 Stat. at L. 313), known as the Wilson act, the state of Pennsylvania may punish plaintiff in error for delivering in that state liquors transported in interstate commerce, under the circumstances stated. The case arose before the passage of the Act of March 1, 1913, ch. 90 (37 Stat. L. 699), known as the Webb-Kenyon Act [omitted as superseded], and the effect of this legislation is therefore not now involved. * * * The Pennsylvania Superior Court deemed that the present case was controlled by Delamater v. South Dakota [S. D. 1907] 205 U. S. 93 [27 S. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733], where a statute imposing an annual license charge upon the business of selling or offering

for sale intoxicating liquors within the state by traveling salesmen soliciting orders was held to be enforceable in view of the Wilson Act, even as applied to the business of soliciting, within the borders of the state, proposals for the purchase of liquors, which were to be consummated by the delivery within the state of liquors to be brought from without. That case, however, has no present pertinency, since the prohibition of the Pennsylvania statute is not addressed to the business of soliciting contracts for the purchase of liquor, but to the sale of the liquor itself; and by the terms of the Wilson Act, as previously construed, the control of this subject by the several states is postponed until after the delivery of the liquor within the state."

The Wilson Act applies in favor of regulatory, as well as prohibitory, state legislation, and state legislation that would be construed as an exercise of the revenue power of the state, when relating to a subject matter other than intoxicating liquors, will be construed as an exercise of its police power, when it relates to intoxicating liquors. Vance v. W. A. Vandercook Co. (S. C. 1898) 170 U. S. 438, 18 S. Ct. 674, 42 L. Ed. 1100; Pabst Brewing Co. v. Crenshaw (Mo. 1905) 198 U. S. 17, 25 S. Ct. 552, 49 L. Ed. 925.

The Ohio Dow Law imposing a tax upon the business of selling intoxicating liquors was an exercise of the police power of the state, and hence applied to sales in the original package in which such liquors were imported. Reymann Brewing Co. v. Brister (Ohio, 1900) 21 S. Ct. 201, 204, 179 U. S. 445, 45 L. Ed. 269.

The exaction by a state of a license fee from a person engaged in selling intoxicating liquors within the state, over the bar, on board a ferryboat employed in interstate commerce, is authorized by this act. Foppiano v. Speed (Tenn. 1905) 26 S. Ct. 138, 140, 199 U. S. 501, 50 L. Ed. 288, affirming (1904) 82 S. W. 222, 113 Tenn. 167.

The annual license charge imposed by a state law upon the business of selling or offering for sale intoxicating liquors within the state by any traveling salesman who solicits orders in quantities of less than five gallons cannot be regarded, when applied to interstate transactions, repugnant to the commerce clause of the federal Constitution, in view of the provisions of this act that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein. Delamater v. South Dakota (S. D. 1907) 27 S. Ct. 447, 205 U. S. 93, 51 L. Ed. 724, 10 Ann. Cas. 733, affirming State v. Delamater (1905) 104 N. W. 537, 20 S. D. 23, 8 L. R. A. (N. S.) 774, 129 Am. St. Rep. 907.

The case of Phillips v. Mobile (Ala. 1908) 208 U. S. 472, 28 S. Ct. 370, 52 L. Ed. 578, is authority for the right of the state or its municipal corporation, since the passage of the Wilson Law, to impose a nondiscriminating license tax on the seller of intoxicating liquors, made and sold to him in another state, after delivery to him in his own state, and in the original package. It is also authority for the proposition that a license tax, imposed on the seller of intoxicating liquors, though in amount greatly in excess of the cost of administering the law, may yet be a tax imposed in the exercise of the police power of the state and not the taxing power. See, also, Richard v. Mobile (Ala. 1908) 28 S. Ct. 372, 208 U. S. 480, 52 L. Ed. 581.

A sale in original package of intoxicating liquors from foreign countries held subject to a state license tax under this act. Frederick De Bary & Co. v. State of Louisiana (La. 1913) 33 S. Ct. 239, 227 U. S. 108, 57 L. Ed. 441, affirming State v. Frederick De Bary & Co. (1912) 58 So. 892, 130 La. 1090.

A municipal ordinance, requiring manufacturers of liquors maintaining a place for their sale within the municipality distinct from their manufactory to pay a license tax, is not invalid as in violation of the interstate commerce clause of the Constitution, as against a manufacturer of another state, who maintains a depot within the city, from which sales are made in the original packages, in view of this act, where it is in its terms such as to bring it within the police power of the state to regulate the business; and the fact that a license fee of $500 per year is required is not sufficient in itself to show that its purpose is to raise revenue, and not to regulate. Duluth Brewing & Malting Co. v. City of Superior (Wis. 1903) 123 F. 353, 59 C. C. A. 481.

Only state statutes enacted in the exercise of the state police powers are within the meaning of the Act. Revenue measures enacted under the taxing power are not included. Pabst Brewing Co. v. Terre Haute (C. C. Ind. 1899) 98 F. 330; Minneapolis Brewing Co. v. McGillivray (C. C. S. D. 1900) 104 F. 264; Pabst Brewing Co. v. Crenshaw (C. C. Mo. 1903) 120 F. 144, affirmed (1905) 25 S. Ct. 552, 198 U. S. 17, 49 L. Ed. 925; Fred Miller Brewing Co. v. Stevens (1897) 102 Iowa, 60, 71 N. W. 186; Stevens v. State (1899) 61 Ohio St. 597, 56 N. E. 478. But see State v. Bixman (1901) 162 Mo. 1, 62 S. W. 828.

A city ordinance enacted pursuant to authority conferred by an act of the legislature imposing a license tax of $1,000 per year on each brewery, depot, or agency of a brewery maintained within the city, no provision being made for the supervision, control, or regulation of such breweries, depots, or agencies, as applied to a depot maintained by a brewing as-

sociation of another state solely for the purpose of storing in the original packages beer shipped into the state until its distribution to customers in the same packages, is invalid, as a tax upon interstate commerce. Such ordinance is not an exercise of the police powers of the state, within the terms of this act, but is purely a revenue measure, enacted in the exercise of the power of taxation. Pabst Brewing Co. v. City of Terre Haute (C. C. Ind. 1899) 98 F. 330.

Semble that articles of interstate commerce being subject to taxation by the state into which they are brought while there held for sale in the original packages, a city ordinance imposing a license tax on dealers in beer even if enacted under the city's power of taxation, and not as a police regulation, is valid as to beer brought from other states and sold in the original bottles, irrespective of the act. Meyer, Jossen & Co. v. City of Mobile (C. C. Ala. 1906) 147 F. 843.

An ordinance of the city of Mobile imposing a license tax on dealers in beer held one enacted in the exercise of the police power conferred on the city by its charter and by virtue of this act, not invalid as in violation of the interstate commerce clause of the federal Constitution as applied to the sale of beer in the bottles in which it was brought from other states. Id.

Under this act one in charge of an agency of a foreign corporation selling beer in Indianapolis, shipped in original packages, without payment of the license fee required by a city ordinance, as authorized by R. S. Ind. 1894, § 3327, to be paid by agencies for foreign breweries, is liable to the penalty provided by such ordinance. City of Indianapolis v. Bieler (1893) 138 Ind. 30, 36 N. E. 857.

The Gay-Shattuck Act is not a revenue act, but a police regulation, within this act, so that a license could be imposed thereunder upon the sale of malt liquor brought into the state in original packages by a brewery. State v. Pabst Brewing Co. (1911) 55 So. 349, 128 La. 770.

A state statute providing for a license tax on persons engaged in the business of disposing of alcoholic liquors in less quantities than five gallons is applicable to persons selling liquor from a warehouse in unbroken packages of three gallons each, and being a police regulation is not invalidated by the Wilson Act. State v. De Bary (1912) 130 La. 1090, 58 So. 892, affirmed De Bary v. State (1913) 33 S. Ct. 239, 227 U. S. 108, 57 L. Ed. 441.

The licensing Acts La. 1880, No. 119, and 1886, No. 101, continued in the acts of 1890, No. 150, 1898, No. 171, and 1908, No. 176, apply to sales of liquor on vessels plying on the Mississippi river in interstate and foreign commerce subsequent to the Wilson Act. State v. Southern Pac. Co. (1915) 68 So. 819, 137 La. 435, L. R. A. 1915F, 1140.

Under this act the question whether Act April 17, 1901, imposing a tax on liquors imported for sale into the state, violates Const. art. 1, § 10, prohibiting any state from laying imposts or duties on imports, or section 8, giving congress the power to regulate interstate commerce cannot arise. State v. Bengsch (1902) 170 Mo. 81, 70 S. W. 710.

The act does not authorize the state to enact laws materially interfering with interstate commerce, but only subjects intoxicating liquors shipped from one state into another to the laws of the state to which it is shipped, and the act is not controlling on the question whether Laws Mo. 1909, p. 654, imposing a license on manufacturers of, and dealers in, intoxicating liquors, interferes with interstate commerce. State v. Parker Distilling Co. (1911) 139 S. W. 453, 236 Mo. 219, 237 Mo. 103.

Acts Tenn. 1903, p. 615, c. 357, § 4, provides that persons selling any quantity of liquor on any vessel shall pay a specified tax. This act provides that all liquors transported to any state, or remaining there for use or consumption or sale, shall on arrival be subject to the laws of the state, and not be exempt therefrom. Held that one running a bar on a vessel belonging to a corporation of Arkansas, and plying between a port in Arkansas and one in Tennessee—the one running the bar acting under a lease from the corporation—is subject to the license tax imposed by the statute for running the bar while the vessel is at its landing within the jurisdiction of Tennessee. Harrell v. Speed (1904) 81 S. W. 840, 113 Tenn. 224, 1 L. R. A. (N. S.) 639, 106 Am. St. Rep. 814, affirmed (1905) 199 U. S. 501, 26 S. Ct. 138, 50 L. Ed. 288.

A prohibitive state license tax on each place of business of an express company where liquors are delivered and price collected on interstate shipments imposes direct burden on interstate commerce, contrary to Const. art. 1, § 8, and which is not permitted by Wilson Act. Rosenberger v. Pacific Exp. Co. (Mo. 1916) 36 S. Ct. 510, 241 U. S. 48, 60 L. Ed. 890, reversing (1914) 167 S. W. 429, 258 Mo. 97.

The fact that a wholesale liquor dealer purchased all of his stock without the state would not under this act render a wholesaler's privilege tax imposed by a state statute violative of the commerce clause (article 1, § 8) of the federal Constitution. Logan v. Brown (1911) 141 S. W. 751, 125 Tenn. 209.

9. Original package.—Where bottles of liquor are placed in a wooden box, and shipped into the state, the box is the original package. Keith v. State (1890) 91 Ala. 2, 8 So. 353, 10 L. R. A. 430, followed

by Harrison v. State (1890) 10 So. 30, 91 Ala. 62; Haley v. State (1894) 42 Neb. 556, 60 N. W. 962, 47 Am. St. Rep. 718; State v. Chapman (1890) 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

Since the enactment of this Act a state may lawfully prohibit or regulate the sale of liquors brought from another state, even while in the original package. Vance v. W. A. Vandercook Co. (Kan. 1898) 18 S. Ct. 674, 170 U. S. 438, 42 L. Ed. 1100, reversing in part and affirming in part W. A. Vandercook Co. v. Vance (C. C. 1897) 80 F. 786.

Where the boxes are furnished by the carrier, and fastened to the car, so as virtually to become a part thereof, the bottles separately wrapped and directed are the original packages. Keith v. State (1890) 91 Ala. 2, 8 So. 353, 10 L. R. A. 430.

Where a nonresident delivered bottles of liquor to a carrier, each separately wrapped and labeled, and the carrier, without the knowledge of consignor, put such bottles into boxes, and thus transported them into Alabama, the bottles, and not the boxes, are "original packages." Tinker v. State (1892) 96 Ala. 115, 11 So. 383.

Where accused ordered four quarts of liquor from a dealer in Tennessee, two for himself and two for another, and the liquor was received in one box by express, the shipment ceased to be interstate commerce, and became subject to the state laws, when accused removed it from the box. Vernon v. State (1909) 50 So. 57, 161 Ala. 83.

The rule established by the Supreme Court of the United States in relation to the rights of states to restrict the sale of imported liquors goes no further than that the importer may sell the articles imported in the form and shape in which they were imported, without impediment from state laws, and does not apply to the sale of liquor by the bottle by one who imports such bottles of liquor in boxes with closed tops, which were broken open. Smith v. State (1891) 54 Ark. 248, 15 S. W. 882.

An injunction will not be granted to restrain a defendant from maintaining a liquor nuisance, when it appears that he is the agent of certain parties in Milwaukee, who are the lessees of the house in which the liquor is kept for sale; that the beer and whisky are put up in sealed bottles in Milwaukee, and, for convenience of shipping, are packed in boxes and barrels; that they are consigned to the Milwaukee owners, and are received by defendant as their agent; that he removes the bottles from the boxes and barrels, but sells them sealed to persons, who are not allowed to open them and drink the contents on the premises. Such a sale is a sale in the original packages, within Leisy v. Hardin (Iowa, 1890) 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128. State v. Coonan (1891) 82 Iowa, 400, 48 N. W. 921.

A person who keeps a saloon, with bar and fixtures, receives as original packages bottles of beer and whisky, and sells the same over his bar to customers who destroy the seals or wire on the bottles, pull the corks, pour the contents into glasses on the bar, drink the same, and leave the bottles on the bar, is a seller of the contents of original packages, and not the original packages themselves. Hopkins v. Lewis (1892) 84 Iowa, 690, 51 N. W. 255, 15 L. R. A. 397, distinguishing Leisy v. Hardin (1890) 135 U. S. 100, 10 S. Ct. 681, 34 L. Ed. 128, and Collins v. Hills (1889) 77 Iowa, 181, 41 N. W. 571, 3 L. R. A. 110.

Where beer, put into sealed bottles and packed in boxes, was sent by a nonresident into this state, consigned to an agent, and the agent, prior to August 14, 1890, merely removed the bottles from the boxes, furnished corkscrew and tumblers, and allowed customers to open for themselves, the sale was in the original packages, and not, therefore, within the prohibitory liquor law. State v. Miller (1892) 86 Iowa, 638, 53 N. W. 330.

Plaintiff, a wholesale liquor dealer in Massachusetts, through his agent at defendant's shop in Maine, contracted to send defendant liquor in original packages, and that defendant should have 10 days after receiving the liquor in which to return it if it was not satisfactory. The liquor was shipped to and received by defendant, and a part of it was returned. Held, in an action for the price, that, as the sale was conditional and incomplete until defendant should receive, unseal, and sample the liquor, the sale could not be upheld as a sale in original packages, since the moment the packages were unsealed a sale became illegal under the laws of Maine. Wasserboehr v. Boulier (1892) 84 Me. 165, 24 A. 808, 30 Am. St. Rep. 344.

10. Arrival in state.—This act attaches to the subject of an interstate shipment only after such shipment has been consummated by the arrival of the goods at their destination and their delivery to the consignee. Rhodes v. State of Iowa (Iowa, 1898) 18 S. Ct. 664, 668, 170 U. S. 412, 42 L. Ed. 1088, reversing (1894) 58 N. W. 887, 90 Iowa, 496; Robertson v. State (1915) 149 P. 194, 46 Okl. 691. See, also, Adams Exp. Co. v. Commonwealth of Kentucky (Ky. 1915) 35 S. Ct. 824, 826, 238 U. S. 190, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167; Vance v. W. A. Vandercook Co. (S. C. 1898) 170 U. S. 438, 18 S. Ct. 674, 42 L. Ed. 1100; In re Van Vliet (C. C. Ark. 1890) 43 F. 761; Ex parte Jervey (C. C. S. C. 1895) 66 F. 961; In re Bergen (C. C. Kan. 1900) 115 F. 339; State v. Hanaphy (1902) 117 Iowa, 15, 90 N. W. 601; Fuqua v. Pabst Brew-

ing Co. (1898) 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241; American Express Co. v. Iowa (Iowa, 1905) 196 U. S. 133, 25 S. Ct. 182, 49 L. Ed. 417; Danciger v. Stone (C. C. Okl. 1909) 187 F. 853; Stevens v. Ohio (C. C. Ohio, 1899) 93 F. 793, affirmed (1900) 21 S. Ct. 917, 179 U. S. 680, 45 L. Ed. 384; Southern Express Co. v. State (1901) 114 Ga. 226, 39 S. E. 899; Crigler v. Com. (1905) 120 Ky. 512, 87 S. W. 276.

The transportation of intoxicating liquor, as of other merchandise, from state to state, is interstate commerce, and state legislation which penalizes it or directly interferes with it, otherwise than as permitted by an Act of Congress, is in conflict with the commerce clause of the Federal Constitution; and while Congress, in the Wilson Act, declared in substance that liquors transported into any state, or remaining therein for use, consumption, etc., shall, upon arrival in such state, be subject to the operation and effect of its laws enacted in the exercise of the police power, to the same extent and in the same manner as though the liquors had been produced in such state, and shall not be exempt therefrom by reason of being introduced in original packages, this does not subject liquors transported in interstate commerce to state regulation until after their arrival at destination and delivery to consignee or purchaser. Rossi v. Pennsylvania (Pa. 1915) 238 U. S. 62, 35 S. Ct. 677, 59 L. Ed. 1201. It is settled that, speaking generally, the states are without power to directly burden interstate commerce, and that commodities moving in such commerce only become subject to the control of the states or to the power on their part to directly burden after the termination of the interstate movement, that is, after the arrival and delivery of the commodities and their sale in the original packages. This rule is as applicable to the movement of intoxicating liquors as to any other commodities. The Wilson Act only modifies these controlling rules by causing interstate commerce shipments of intoxicating liquors to come under state control at an earlier date than they otherwise would, that is after delivery but before sale in the original packages. Rosenberger v. Pacific Exp. Co. (Mo. 1916) 241 U. S. 48, 36 S. Ct. 510, 60 L. Ed. 880.

Act Ala. Aug. 25, 1909 (Acts 1909, p. 86) § 23, makes it unlawful for any person to receive for storage, distribution, or on consignment prohibited liquors and beverages, or to maintain any place for such purposes. The claimant of beer which had been seized under a search warrant in proceeding by the state, was the agent of shippers retaining the jus disponendi, and had received the beer as ordered through him by purchasers to whom he was to deliver it. Held, under the Wilson Act, that the keeping of the beer in storage after arrival was an interruption of its course of shipment, and made it subject to the state laws. Toole v. State (1911) 54 So. 195, 170 Ala. 41.

A citizen of Atlanta, who has ordered liquors to be shipped to that city in interstate commerce, cannot be convicted of a violation of Code of Atlanta, § 1537, until delivery of the shipment to the person for whom the liquors were intended, or some agent authorized by him to receive it. Shaw v. City of Atlanta (1912) 75 S. E. 486, 11 Ga. App. 391.

Where liquors are brought to Atlanta in interstate commerce for delivery to a resident, who pays the freight and surrenders the bill of lading and receives an order for the delivery of the liquors, the contract of carriage is ended, and the carrier holds the goods as agent, and the consignee can be convicted of a violation of Code of Atlanta, § 1537, though he has not taken the liquors from the custody of the carrier. Id.

Rev. St. Me. c. 27, § 31, provides that no person shall knowingly bring into the state, or transport from place to place therein, any intoxicating liquors with intent to sell the same in violation of law. Held in view of this act, that where intoxicating liquors, shipped from New Hampshire to Lewiston, in this state, were seized by police officers while the car containing the same was standing at a siding at Auburn, and still in transit, the seizure was premature and illegal. State v. Intoxicating Liquors (1900) 47 A. 531, 94 Me. 335.

Certain liquors were seized by the sheriff under process of seizure and search. It appeared by shipping receipts given by a steamship company, when it received the liquors in a foreign state for shipment, that they were to be transported over a certain railroad. By mistake the waybill accompanying the liquors directed their transportation to such place over another railroad. They were shipped over the latter line, and received in their warehouse, awaiting the order of their consignee, and three-quarters of a mile away from the station of the railroad over which they should have been shipped. Held, that neither the right of the consignee to refuse to receive the liquors at such station nor the right of the claimant steamship company to recall them, so as to rectify its mistake as to shipment, can affect the question as to whether the liquors still retain their character as articles of interstate commerce. State v. Intoxicating Liquors (1902) 52 A. 911, 96 Me. 415.

Where liquors were transported into the state to their place of ultimate destination, designated on the freight waybill accompanying them, and there remain for storage to await the orders of the consignee, their transportation as articles of interstate commerce ceases, and they have arrived within the state, so as

to be subject to the laws of the state within the meaning of this act. Id.

Delivery of an interstate shipment of intoxicating liquors to the consignees is essential to constitute their arrival within the meaning of this act; and the rule is the same whether the consignee is known to the carrier or not, and whether the name of the consignee is fictitious or not. State v. Intoxicating Liquors (1907) 67 A. 312, 102 Me. 206, overruling State v. Intoxicating Liquors (1901) 95 Me. 140, 49 A. 670.

An interstate shipment of intoxicating liquor delivered to consignee by the carrier and in his exclusive possession on its premises may be seized and confiscated under Enforcing Act (Sess. Laws Okl. 1907-08, p. 505, c. 69) art. 3, §§ 5, 6, before the same has been conveyed by consignee from the carrier's premises to his residence, place of business, or warehouse, if he intends to sell the same in violation of the prohibitory law. State v. Eighteen Casks of Beer (1909) 104 P. 1093, 24 Okl. 786, 25 L. R. A. (N. S.) 492.

No person can ship into the state intoxicating liquors as interstate commerce, and use the depot as the point of their destination and as a warehouse for general distribution. Walker v. State (1912) 127 P. 895, 11 Okl. Cr. 339.

Defendant purchased whisky in North Carolina, and while transporting it from the place of purchase to his home, after entering South Carolina, was arrested for a violation of the state law, and the whisky seized. The liquor was for his personal use, was being conveyed by him in his buggy, and nothing had been done to break the continuity of the transportation from the place of purchase to his home. Held, that the whisky had not at the time of its seizure "arrived," within the meaning of this act, but was in course of transportation, and was not subject to seizure under the state laws. State v. Holleyman (1899) 33 S. E. 366, 55 S. C. 207, 45 L. R. A. 567.

The imported original package becomes subject to state laws "upon arrival" and transportation is not complete until delivery to the consignee or the expiration of a reasonable time therefor. Kirmeyer v. Kansas (Kan. 1915) 236 U. S. 568, 35 S. Ct. 419, 59 L. Ed. 721, reversing (1913) 88 Kan. 589, 128 P. 1114.

The expression, "upon arrival in such state," means neither on entrance within the borders of the state, nor on delivery to the consignee, but on reaching its destination. In re Langford (C. C. S. C. 1893) 57 F. 570; Hudson v. State (1909) 101 P. 275, 2 Okl. Cr. 176.

A shipment of liquor from one state into another is, by virtue of this act, under the protection of the interstate commerce law only up to the time of its delivery at the point of destination to the consignee; and thereafter it is subject to the state prohibition laws. Priest v. State (1912) 59 So. 318, 5 Ala. App. 171.

Under this act the police power of a state attaches immediately after delivery to the consignee of an interstate shipment of intoxicating liquor. State v. Eighteen Casks of Beer (1909) 104 P. 1093, 24 Okl. 786, 25 L. R. A. (N. S.) 492.

Delivery of an interstate shipment of intoxicating liquors to the consignees is essential to constitute their arrival in the state within this act, subjecting all intoxicating liquors arriving in the state to the laws of such state enacted in the exercise of its police power. Heymann v. Southern Ry. Co. (Ga. 1906) 27 S. Ct. 104, 105, 203 U. S. 270, 51 L. Ed. 178, 7 Ann. Cas. 1130, reversing Heyman v. Southern R. Co. (1905) 50 S. E. 342, 122 Ga. 608.

The mere placing of an interstate shipment of intoxicating liquors in the carrier's warehouse to await delivery to the consignees does not constitute their arrival in the state. Id.

This section does not cause the power of a state to attach to an interstate shipment of liquor while the same is in transit and until its arrival at the point of destination and delivery to the consignee, for transportation is not complete until delivery to the consignee. Adams Exp. Co. v. Kentucky (Ky. 1909) 29 S. Ct. 633, 634, 214 U. S. 218, 53 L. Ed. 972.

This statute does not apply before actual delivery to the consignee, where the shipment is interstate. Louisville & N. R. Co. v. F. W. Cook Brewing Co. (Ind. 1912) 32 S. Ct. 189, 191, 223 U. S. 70, 56 L. Ed. 355.

An agent of a West Virginia brewing company took an order for a keg of beer, to be delivered at the residence of the purchaser in Ohio, at which place the order was taken. The beer was shipped to a near-by railroad station, the keg having a card attached, on which was written the name of the purchaser, though it did not appear to whom it was billed. It was received, however, by another agent of the company, who conveyed it to the residence of the purchaser, and there delivered it, the selling agent afterwards collecting the price. Held, that the transaction was a sale in Ohio, having no relation to interstate commerce; that, on the arrival of the beer at the station, and its delivery to the agent of the brewing company, the interstate shipment terminated, and the beer had "arrived within the state," within the meaning of the act, and was thereafter subject to the operation of the state laws regulating its sale; that, so far as any question of interstate commerce was concerned, it was immaterial whether the sale was made before or after such arrival. Stevens v. State of Ohio (C. C. Ohio, 1899) 93 F. 793, affirmed (1900) 21 S. Ct. 917, 179 U. S. 680, 45 L. Ed. 384.

Where intoxicating liquors are shipped from one state into another, moving the goods into the station from the platform

on which they are put on arrival, to the freight warehouse, is a part of the interstate commerce transportation, as such transportation does not cease until the delivery of the consignment into the hands of the consignee. Rhodes v. Iowa (Iowa, 1898) 170 U. S. 412, 18 S. Ct. 664, 42 L. Ed. 1088, reversing State v. Rhodes (1894) 90 Iowa, 496, 58 N. W. 887, 24 L. R. A. 245, distinguished in State v. Intoxicating Liquors (1901) 95 Me. 140, 49 Atl. 670; Southern Express Co. v. State (1901) 114 Ga. 226, 39 S. E. 899.

Where a person went outside the state and purchased intoxicating liquors and brought them into the state himself, it was held that the state law did not operate until he had reached his destination. Hudson v. State (1909) 2 Okl. Cr. 176, 101 P. 275. And in High v. State (1909) 2 Okl. Cr. 161, 101 P. 115, 28 L. R. A. (N. S.) 162, it was held that carrying or conveying intoxicating liquors from the railroad station to the home of the consignee is a part of the interstate commerce transportation, when they were shipped from another state, and is not a violation of a constitutional clause making the conveyance of such liquors from one place within a state to another place therein an offense.

Interstate shipment of intoxicating liquors, unless concluded by delivery to the consignee, is not subject to seizure on day of its arrival at point to which shipped, and to confiscation by state. Brandon v. State (1917) 167 P. 212, 66 Okl. 69.

Despite rulings under Wilson Act, held, that intoxicating liquors consigned to shipper with directions to notify another are subject to state laws where retained by carrier for an unreasonable time; a constructive delivery being presumed. Charleston & W. C. Ry. Co. v. Gosnell (1916) 90 S. E. 264, 106 S. C. 84, L. R. A. 1917B, 215.

The protection afforded interstate shipments of intoxicating liquors under Const. U. S. art. 1, § 8, cl. 3, and this act until shipments have terminated, was withdrawn by the Webb-Kenyon Act (omitted as superseded). State v. Intoxicating Liquors (1920) 109 A. 257, 119 Me. 1.

11. Solicitation of orders.—Notwithstanding the above statute, a state statute has no application to a nonresident traveling salesman representing citizens and residents of other states, who merely solicits orders for the sale of intoxicating liquors to be subsequently shipped into the state to the vendees, and transmits such orders to his employers beyond the boundaries of the state, to be there passed upon by them. Rossi v. Pennsylvania (Pa. 1915) 238 U. S. 62, 35 S. Ct. 677, 59 L. Ed. 1201; In re Bergen (C. C. Kan. 1900) 115 F. 339; State v. Hickox (1902) 64 Kan. 650, 68 P. 35. But see Bluthenthal v. McWhorter (1901) 131 Ala. 642, 31 So. 559; Moog v. State (1906) 145 Ala. 75, 41 So. 166; McCollum v. McConaughy (1909) 119 N. W. 539, 141 Iowa, 172, overruling State v. Hanaphy (1902) 117 Iowa, 15, 90 N. W. 601.

Pen. Code Ga. 1895, § 428, prohibiting the solicitation of orders for intoxicating liquor in a prohibition county, is not void under this Act, on the ground that it conflicts with the power of Congress to regulate and control interstate commerce, though the seller and the liquor sold may both be in another state. Rose v. State (1908) 62 S. E. 117, 4 Ga. App. 588.

Pub. St. N. H. c. 112, § 19, making any person who shall within the state take an order for spirituous liquor to be delivered at any place without the state, knowing that, if so delivered, the same will be transported to the state and sold in violation of law, liable to fine and imprisonment, was held in violation of the interstate commerce clause of the federal constitution. Held, that this act, did not give the state power to interfere with interstate commerce in intoxicating liquors by enacting laws having extraterritorial effect, and hence did not revive Pub. St. N. H. c. 112, § 19. Corbin v. McConnell (1902) 52 A. 447, 71 N. H. 350.

As by this act the mere solicitation within the state of orders for liquors located outside the state is rendered subject to regulation by the police power of the state, so also the making of a contract by the acceptance of orders, within the state, is also subject to the exercise of the police power. Commonwealth v. Rossi (1913) 53 Pa. Super. Ct. 210.

Code W. Va. 1899, c. 32 (Code 1906, §§ 913–1063), prohibits a nonresident liquor dealer having no license in the state to sell at retail and to solicit orders for liquors from soliciting orders for the same to be sold at and shipped into the state from a place without the state. State v. Miller (1909) 66 S. E. 522, 66 W. Va. 436.

In view of this act a state may, without offending the commerce clause, regulate or control the traffic in intoxicating liquors within its own borders, to the extent of prohibiting the soliciting of orders within the state for the purchase of liquors outside the state. Ex parte Anixter (1913) 134 P. 193, 22 Cal. App. 117.

A dealer is declared to have a constitutional right notwithstanding the Wilson Act to sell and ship liquor into another state to be delivered to the buyer for his own use, free from state interference, a right, which except for Congressional action, carried with it the incidental right to solicit such business within that state. And yet because of the Wilson Act the state may punish the solicitors of such a dealer for taking within its boundaries orders to be filled in accordance with his constitutional privilege, one of the reasons given for this conclusion being that a contrary doctrine "would be repugnant to the plain spirit of the Wilson Act." Delamater v. South

Dakota (S. D. 1907) 205 U. S. 93, 27 S. Ct. 447, 51 L. Ed. 724, 10 Ann. Cas. 733.

One who takes order in state to be filled by concern residing in another state for artificial fruit juice containing no trace of alcohol when delivered is not guilty of engaging in liquor traffic, under Laws 1923, c. 268, §§ 1, 1B or 2G, in view of Laws 1921, c. 97, §§ 3, 4, which is equivalent to section 30 of this title, regardless of exceptions of Wilson Act making original packages of intoxicating liquors transported into state subject to its police powers. State v. Daniels (1925) 206 N. W. 78, 53 N. D. 403.

12. Importation prior to act.—A shipment of liquors into a state before the enactment of this statute held a lawful act of interstate commerce, and hence the liquors were not liable to seizure under the state law. Leisy v. Hardin (Iowa, 1890) 10 S. Ct. 683, 135 U. S. 100, 34 L. Ed. 128.

Liquors imported before but sold after enactment of statute are subject to state laws. Tinker v. State (1890) 90 Ala. 638, 8 So. 814, in which case it was said: "The withdrawal of federal regulations applies to all liquors 'transported'—not such only as shall be transported—'into the state or remaining therein for use.'"

Under the decision of the Supreme Court of the United States in the case of Leisy v. Hardin (1890) 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, an importer of intoxicating liquors, into any state from any other state or country, could, by himself or agent, prior to the passage of this act, sell such liquors so long as they remained in the unbroken packages in which they existed during their transportation, without regard to the laws of the state into which such liquors were imported, and without regard to the size of the packages. State v. Winters (1890) 44 Kan. 723, 25 P. 235, 10 L. R. A. 616.

Where liquor is shipped by nonresidents of the state to their agent in Boston, under a contract which he has made for its sale, and of which he has notified them, and the agent, upon its arrival, causes the liquor to be delivered to the purchasers in the original packages in which it was shipped, an action is maintainable for the price, even though the importers did not have the license required by law to sell liquor in Boston. Carstairs v. O'Donnell (1891) 154 Mass. 357, 28 N. E. 271.

The price of liquor sold in another state, in violation of Gen. Laws N. H. c. 109, § 18, making penal the soliciting or taking orders for intoxicating liquors in the state for delivery in another state, with knowledge or reasonable cause to believe they are to be brought within the state and sold in violation of the laws thereof, before the passage of Act Aug. 8, 1890 (the Wilson Bill), can be recovered. Durkee v. Moses (N. H. 1892) 23 A. 702, overruling Dunbar v. Locke (1883) 62 N. H. 442, and Jones v. Surprise (1887) 64 N. H. 243, 9 A. 384.

II. DECISIONS UNDER WEBB-KENYON ACT

For the text of the Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699) which was apparently omitted from the Code as superseded, see the historical note to section 1 of this title.

21. Character of liquor as interstate commerce in general.—A count charging that defendant unlawfully brought ardent spirits into the state from a point without the state was good, where it did not charge that they were transported in interstate commerce. Hunt v. Commonwealth (1920) 101 S. E. 896, 126 Va. 815.

22. Power of Congress.—Congress may adopt a law which divests intoxicating liquor of its character as interstate commerce, sooner than would otherwise be the case, for the purpose of supplementing the prohibitory laws of the state. State v. Grier (Del. 1913) 88 A. 579, 4 Boyce, 322.

Prior to any legislation by Congress, the right to sell in the original package was inherent in the shipment of intoxicating liquors from one state to another, and, while this right could not be interfered with by the state, it could be withdrawn by Congress. Glenn v. Southern Express Co. (1915) 87 S. E. 136, 170 N. C. 286, L. R. A. 1918B, 438, writ of error dismissed (1917) 38 S. Ct. 133, 245 U. S. 679, 62 L. Ed. 543.

23. Validity of statute.—Congress did not exceed its power under commerce clause in enacting this section, nor is it repugnant to the due process of law clause of Const. Amend. 5. James Clark Distilling Co. v. Western Maryland R. Co. (Md. 1917) 37 S. Ct. 180, 242 U. S. 311, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845.

The act is constitutional. U. S. v. Oregon-Washington R. & Navigation Co. (D. C. Or. 1913) 210 F. 378; State v. Grier (Del. 1913) 88 A. 579, 4 Boyce, 322; State v. Van Winkle (Del. 1913) 88 A. 807, 4 Boyce, 405, reversed Van Winkle v. State (1914) 91 A. 385, 4 Boyce, 578, Ann. Cas. 1916D, 104; State v. United States Express Co. (1914) 145 N. W. 451, 164 Iowa, 112; State v. Seaboard Air Line Ry. (1915) 84 S. E. 283, 169 N. C. 295, affirmed Seaboard Air Line Ry. v. State of North Carolina (1917) 38 S. Ct. 96, 245 U. S. 298, 62 L. Ed. 299; Glenn v. Southern Express Co. (1915) 87 S. E. 136, 170 N. C. 286, L. R. A. 1918B, 438; Smith v. Southern Express Co. (1914) 82 S. E. 15, 166 N. C. 155; State v. Little (1916) 88 S. E. 723, 171 N. C. 805; Brennen v. Southern Express Co. (1916) 90 S. E. 402, 106 S. C. 102; Ex parte Peede (1914) 170

S. W. 749, 75 Tex. Cr. R. 247; Ex parte Pratt (1918) 97 S. E. 301, 83 W. Va. 51; Gottstein v. Lister (1915) 153 P. 595, 88 Wash. 462, Ann. Cas. 1917D, 1008. It is a valid exercise by Congress of the power to regulate commerce. Southern Express Co. v. State (1914) 66 So. 115, 188 Ala. 454; State v. Missouri Pac. Ry. Co. (1915) 152 P. 777, 96 Kan. 609, Ann. Cas. 1917A, 612, affirmed, Missouri Pac. Ry. Co. v. State of Kansas (1919) 39 S. Ct. 93, 248 U. S. 276, 63 L. Ed. 239, 2 A. L. R. 1589; Adams Express Co. v. Commonwealth (1914) 169 S. W. 603, 160 Ky. 66; American Express Co. v. Beer (1914) 65 So. 575, 107 Miss. 528, L. R. A. 1918B, 446, Ann. Cas. 1916D, 127; Southern Express Co. v. Longinotti (Miss. 1914) 65 So. 583; American Express Co. v. Miller (Miss. 1914) 65 So. 652; Taylor v. Commonwealth (1915) 85 S. E. 499, 117 Va. 909. And is not unconstitutional as an attempt to confer upon the states the power to regulate interstate commerce. State of West Virginia v. Adams Express Co. (W. Va. 1915) 219 F. 794, 135 C. C. A. 464, L. R. A. 1916C, 291, reversing (D. C. 1914) 219 F. 331; Southern Express Co. v. Whittle (1915) 69 So. 652, 194 Ala. 406, L. R. A. 1916C, 278; State v. Grier (Del. 1913) 88 A. 579, 4 Boyce, 322; State v. U. S. Express Co. (1914) 145 N. W. 451, 164 Iowa, 112; State v. Doe (1914) 139 P. 1169, 92 Kan. 212; State v. Missouri Pac. Ry. Co. (1915) 152 P. 777, 96 Kan. 609, Ann. Cas. 1917A, 612, affirmed Missouri Pac. Ry. Co. v. State of Kansas (1919) 39 S. Ct. 93, 248 U. S. 276, 63 L. Ed. 239, 2 A. L. R. 1589; Glenn v. Southern Express Co. (1915) 87 S. E. 136, 170 N. C. 286, L. R. A. 1918B, 438. Nor as an infringement of the right to contract for an interstate shipment. State v. Grier (Del. 1913) 88 A. 579, 4 Boyce, 322. And does not deny the equal protection of the laws. State v. United States Express Co. (1914) 145 N. W. 451, 164 Iowa, 112.

The act being declaratory or remedial and not penal, does not require a vindicatory part. State v. United States Express Co. (1914) 145 N. W. 451, 164 Iowa, 112.

But see (1913) 30 Op. Atty. Gen. 88, holding that the bill entitled "An act divesting intoxicating liquors of their interstate character in certain cases" (S. 4043, 62d Cong., 3d Sess.), is repugnant to the Constitution of the United States, since it delegates to the states the power to regulate interstate commerce.

24. Purpose of statute.—Discussing the antecedents of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, the court in James Clark Distilling Co. v. Western Maryland R. Co. (Md. 1916) 37 S. Ct. 182, 242 U. S. 311, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, said: "To correct the great evil which was asserted to arise from the right to ship liquor into a state through the channels of interstate commerce, and there receive and sell the same in the original package, in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson law [omitted as superseded] forbidding the sale of liquor in a state in the original package although brought in through interstate commerce, when the existing or future state laws forbade sales of intoxicants. And this was recognized by the long line of decisions which upheld that law, and pointed out that it permitted the state prohibitions to take away from interstate commerce shipments a right which they otherwise would have embraced; that is the right to sell after receipt in the original package, any state law to the contrary notwithstanding. At the same time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a state where what is known as the dispensary system prevailed. Reading the Webb-Kenyon law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." To the same effect see U. S. v. Lazaro (D. C. Wash. 1918) 255 F. 237.

The history of the Webb-Kenyon law, the causes that led to its enactment and the evils it was intended to remedy, taken in connection with the carefully chosen words of the Act, show that the object was to aid the states in suppressing the illegal traffic in intoxicating liquors that they had been much hindered in doing by the protection afforded violators of the law by the commerce clause of the Federal Constitution, and that it was not meant by this legislation in any manner to abridge the personal liberty of the citizen in the right personally to use liquor or the right to have it in his possession for such use. Adams Express Co. v. Com. (1913) 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342.

25. Construction and operation in general.—Carrier of intoxicating liquor has been held to have interest therein, within this section, as to transportation of liquor intended by any person interested therein, to be used, etc., in violation of state law. Theo. Hamm Brewing Co. v.

Chicago, R. I. & P. Ry. Co. (Ill. 1917) 243 F. 143, 156 C. C. A. 9.

A liquor dealer, who is transporting whisky for delivery in local option territory to one who has purchased and paid for it, is interested therein within the meaning of the law. State v. Grier (Del. 1913) 88 A. 579, 4 Boyce, 322.

The act does not interfere with state policy, but merely provides that the enforcement of a state statute will not be interfered with by the interstate commerce clause. Atkinson v. Southern Express Co. (1913) 78 S. E. 516, 94 S. C. 444, 48 L. R. A. (N. S.) 349; Atkinson v. Southern Express Co. (1913) 78 S. E. 520, 94 S. C. 457.

This section is applicable to shipments intended only for personal use, provided such shipments, and the receipt, possession, or use of the liquors, is in violation of state law; but this section did not confer on any state power to make unjust discriminations against products of other states which are recognized as objects of lawful commerce, nor power to unjustly discriminate between its own citizens. Brennen v. Southern Express Co. (1916) 90 S. E. 402, 106 S. C. 102.

26. Repeals.—The Webb-Kenyon Act does not repeal, or suspend the provisions of section 388 of Title 18, Criminal Code and Criminal Procedure, which denounces under penalty of a fine or imprisonment, the offense of the delivery by an agent or employee of an express company, or other common carrier, to any fictitious person or to any person under a fictitious name, of any intoxicating liquor shipped in interstate commerce. Witte v. Shelton (Mo. 1917) 240 F. 265, 153 C. C. A. 191, certiorari denied (1917) 37 S. Ct. 745, 244 U. S. 660, 61 L. Ed. 1376.

This act merely reinforcing the state statutes with relation to illicit liquor dealers, and the Reed Amendment of March 3, 1917 (omitted in part as superseded), giving federal cognizance and fixing a penalty for violation, are merely cumulative, and not out of harmony with applicability of sections 193 and 306 of Title 26, Internal Revenue, the primary purpose of which is revenue, to prohibition states. U. S. v. Lazzaro (D. C. Wash. 1918) 255 F. 237.

This act divesting intoxicating liquors of interstate character in certain cases, did not, since Rev. Laws Okl. 1910, § 3605, made shipments into the state unlawful, repeal Act March 1, 1895, § 8 (omitted from Code) prohibiting interstate shipments of intoxicating liquor into the Indian Territory, especially in view of the Reed Amendment (omitted in part as superseded) imposing a penalty for illegal shipments. Ammerman v. U. S. (C. C. A. Okl. 1920) 267 F. 136, certiorari denied (1920) 41 S. Ct. 147, 254 U. S. 650, 65 L. Ed. 457.

27. Divestiture of interstate character and subjection to state laws.—Shipments into a state of intoxicating liquors intended for the personal use of consignees were not subjected to a law of such state forbidding carriers to bring intoxicating liquors into any dry territory by Webb-Kenyon Act. Adams Exp. Co. v. Commonwealth of Kentucky (Ky. 1915) 35 S. Ct. 824, 238 U. S. 190, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167; Adams Express Co. v. Commonwealth (1914) 169 S. W. 603, 160 Ky. 66; Palmer v. Southern Exp. Co. (1914) 165 S. W. 236, 129 Tenn. 116.

The Webb-Kenyon Act altered the law to the extent of divesting intoxicating liquors of their interstate character in certain cases. The Act does not prohibit all interstate shipment or transportation of liquor into so-called dry territory but renders the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the state wherein they are received. So, except as affected by the Wilson Act (omitted as superseded) which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the state to be dealt with therein in violation of local law, the subject matter of such interstate shipment is left untouched and remains with the sole jurisdiction of Congress under the Federal Constitution. Adams Express Co. v. Kentucky (Ky. 1915) 238 U. S. 190, 35 S. Ct. 824, 59 L. Ed. 1267, Ann. Cas. 1915D, 1167, L. R. A. 1916C, 273. See to the same effect Southern Express Co. v. State (1914) 188 Ala. 454, 66 So. 115; Adams Express Co. v. Crigler, etc., Co. (1914) 161 Ky. 89, 170 S. W. 542; Ex parte Peede (1914) 75 Tex. Crim. 247, 170 S. W. 749.

In James Clark Distilling Co. v. Western Maryland R. Co. (Md. 1916) 37 S. Ct. 180, 242 U. S. 311, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845, it was held that an interstate shipment of intoxicating liquor, although intended for personal use, was not beyond the reach of the Webb-Kenyon Act and that the prohibitions of a state law could be enforced against it. In that case the court said: "It is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the

Webb-Kenyon Act plainly appears, since if that be not true, the coming into being of the act is wholly inexplicable. The case in this court relied upon to establish the contrary, Adams Express Co. v. Kentucky [Ky. 1915] 238 U. S. 190, 35 S. Ct. 824, 59 L. Ed. 1267, Ann. Cas. 1915D, 1167 [L. R. A. 1916C, 273] clearly does not do so. All that was decided in that case was that, as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is Van Winkle v. State [1914] 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local option territory, and if the Webb-Kenyon law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibition because the Webb-Kenyon law was not correctly applied, for the following reason: Coming to consider the text of that law, the court said that as the Webb-Kenyon Act prohibited the shipment of intoxicants 'only when liquor is intended to be used in violation of the laws of the state,' and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made, since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that Act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

In West Virginia v. Adams Express Co. (W. Va. 1915) 219 F. 794, 135 C. C. A. 464, L. R. A. 1916C, 291, the court said; "The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson bill [omitted as superseded] liquor dealers in one state were protected in impairing or defeating the efforts of another state to root out or to minimize the evil of the use of liquors as a beverage. This statute prohibits the shipment or transportation of liquor from one state into another, not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed or in any manner used in violation of the state law. This is a direct recognition of the right of the state to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The state of West Virginia has enacted with reference to a contract for the sale of liquor that 'the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee,' and it expressly forbids a sale within the state. This makes the receipt or delivery have the effect of a sale, and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and delivery already made in this case and the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of state prohibition laws which it was the manifest intention of the Congress to remove."

Where a state statute prohibited the sale of intoxicating liquors within four miles of a schoolhouse where school was kept, and it appeared that certain persons had received and possessed intoxicating liquors in Memphis, and were not only offering but were engaged in selling them at their place of business to purchasers residing in other states, directly or by money orders received through the mails, or by telegraph or telephone orders, it was held that such persons were not protected by the Federal Constitution and laws of Congress relating to interstate commerce. Under the Webb-Kenyon Act the stock of intoxicating liquors in such place of business in Memphis was divested of its interstate character when shipped into Tennessee in violation of law and it was there subject to be dealt with under the laws of the state enacted in the exercise of its police power, with the same force and effect as though the power to regulate commerce among the several states had never been granted to Congress or as though Congress had never undertaken to regulate commerce among the states by legislation. Laughter v. McLain (D. C. Tenn. 1916) 229 F. 280.

This section takes away the protection of interstate commerce from all receipt and possession of liquor prohibited by state law. Theo. Hamm Brewing Co. v. Chicago, R. I. & P. Ry. Co. (Ill. 1917) 243 F. 143, 156 C. C. A. 9.

Under the Webb law, the Carmichael bill (Acts Ala. Sp. Sess. 1909, p. 63), and the Fuller bill (Acts Ala. Sp. Sess. 1909,

p. 63), an interstate carrier in possession of liquor in the state for delivery to a person intending to use it in violation of law is amenable to the state laws, unless it has no knowledge of the unlawful purpose. Southern Express Co. v. State (1914) 66 So. 115, 188 Ala. 454.

Where an interstate consignment of liquor is intended by any person interested in same to be a means of violating valid state laws governing liquors described in this section, it does not become an article of lawful interstate commerce; and the inherent limitations on the territorial operation of state laws cannot protect a carrier in accepting shipment outside the state and unlawfully transporting same into Alabama. State v. Southern Express Co. (1917) 75 So. 343, 200 Ala. 31.

Inasmuch as the Supreme Court has construed the word "arrival" in the Wilson Act (omitted as superseded) to mean "arrival at destination and delivery to the consignee," the Webb-Kenyon Act, which was passed to supplement the Wilson Act, means that an interstate shipment of liquor shall be subject to state laws upon arrival at any point within the state. Clearly that was what the law was designed to accomplish by prohibiting the transportation, and the law can be made effective only by holding that it applies to transportation agencies, as well as to consignors and consignees who receive or ship the liquor for the purpose of sale. State v. Grier (Del. 1913) 4 Boyce, 322, 88 A. 579.

"By the Wilson Law [omitted as superseded] the resale by the consignee was the only thing prohibited, leaving the carrier free to transport liquor into the territory of a prohibition state, either for purposes made lawful or unlawful by the laws of such state. The Wilson Law affected interstate commerce, and divested commerce in liquor of its interstate character only to the extent of subjecting it to the state law and of depriving it of its right of resale after delivery to the consignee, and left the carrier under the protection of the commerce clause of the Constitution for the rest of the interstate transaction. Under this protection the carrier could import liquor into a prohibition state, whether the intended use of the liquor was lawful or unlawful. In fact under this protection a carrier could import liquor into a prohibition state, with full knowledge that upon arrival at destination and delivery to the consignee it was intended by him to be received, possessed, sold or otherwise used in violation of the laws of that state. This was the mischief intended to be remedied by the Webb-Kenyon Law, as this was the state of the law after the enactment of the Wilson Law and after the decision of the Supreme Court in Louisville, etc., R. Co. v. F. W. Cook Brewing Co. (Ind. 1912) 223 U. S. 70, 32 S. Ct. 189, 56 L. Ed. 355, decided January 22, 1912, and the state of the law when the Webb-Kenyon bill was introduced in Congress and finally enacted on March 1, 1913. To remedy this evil and to aid the states in preventing the shipment of liquor for unlawful purposes, the Webb-Kenyon Law attempted a very different thing from what the Wilson Law did, and by clear expression withdrew or attempted to withdraw from the carrier of liquor intended for unlawful purposes the protection it theretofore had, and afforded the states a means by which they could more effectively reach and prevent the violation of their liquor laws, when liquors were imported for the purpose of the violation of those laws. We find nothing in the law which affords a means to the states to prevent the transportation of liquor by a common carrier when the liquor is intended for a lawful purpose." Van Winkle v. State (1914) 4 Boyce (Del.) 578, 91 A. 385, Ann. Cas. 1916D, 104.

This act does just what the title says it was intended to do, to wit, divests intoxicating liquors of their interstate character in certain cases, and these cases are specifically set out in the Act itself. That is to say, the shipment or transportation of intoxicating liquor from one state to another, when such shipment is intended by any person therein to be received, sold, or used in violation of any law of such state (to which the shipment is made), is prohibited. This is the sum and substance of the act. State v. U. S. Exp. Co. (1914) 164 Iowa, 112, 145 N. W. 451.

Under the Webb-Kenyon Act, intoxicating liquors, brought from another state and intended to be used in violation of the law of Kansas, are not articles of interstate commerce. Kansas City Breweries Co. v. Kansas City (1915) 153 P. 523, 96 Kan. 731.

This act withdraws from the protection of the commerce clause of the federal Constitution intoxicating liquors brought into local option territory for use in violation of the law of the state and subjects a carrier of an interstate shipment of liquor into local option territory to the punishment imposed by the state law, where the person receiving the liquor intends to use it in violation of law. Adams Express Co. v. Commonwealth (1913) 157 S. W. 908, 154 Ky. 462; Adams Express Co. v. Commonwealth (1914) 169 S. W. 603, 160 Ky. 66.

In Com. v. White (1915) 166 Ky. 528, 179 S. W. 469, it was held that where it is not unlawful for one to buy where it is lawful to sell intoxicating liquor for personal use and bring it into a state, or to have liquors so purchased in personal possession for such use, the protection of the commerce clause still attaches to such shipments.

The protection afforded interstate shipments of intoxicating liquors under

Const. U. S. art. 1, § 8, cl. 3, and the Wilson Act (omitted as superseded) until shipments have terminated, was withdrawn by this act. State v. Intoxicating Liquors (1920) 109 A. 257, 119 Me. 1.

The purpose of this statute was "to make it unlawful to transport into a state from without intoxicating liquors intended by any person interested therein to be dealt with contrary to the laws of the state; in other words, to divest such intoxicating liquor altogether of its interstate character, and thereby permit the laws of the state into which it was being transported to operate upon it immediately upon its crossing the state line —from which it follows that the state may prescribe not only the use to which liquor is to be put, but the quantity that, and the manner in which it, may be received." American Express Co. v. Beer (1914) 107 Miss. 528, 65 So. 575, Ann. Cas. 1916D, 127.

The act classifies interstate shipments of intoxicating liquors into legal and illegal, withdrawing from the effect and operation of the commerce clause of the Federal Constitution all such shipments into prohibition territory with intent to violate the laws. State v. Seaboard Air Line R. Co. (1915) 169 N. C. 295, 84 S. E. 283, affirmed Seaboard Air Line Ry. v. State of North Carolina (1917) 38 S. Ct. 96, 245 U. S. 298, 62 L. Ed. 299.

This act has been held to withdraw shipments of intoxicating liquors from operation of the commerce clause of the federal Constitution and to bring them within the police power of the state as soon as they cross the state line. State v. Seaboard Air Line Ry. (1915) 169 N. C. 295, 84 S. E. 283, affirmed Seaboard Air Line Ry. v. State of North Carolina (1917) 38 S. Ct. 96, 245 U. S. 298, 62 L. Ed. 299.

Where a brewing company licensed in Pennsylvania sends beer to a branch establishment in another state, and from this branch delivers beer to customers in a county in Pennsylvania over which its license does not extend, such sale is not protected as interstate commerce, if it appears that it was consummated after the passage of this section. Commonwealth v. Hull (1917) 65 Pa. Super. Ct. 450.

Where a wholesale dealer in another state through his agents contracts for and delivers liquor in a county in Pennsylvania in which his license does not extend, such sale is not protected as interstate commerce since the passage of this section. Commonwealth v. Jacobson (1919) 72 Pa. Super. Ct. 38; Commonwealth v. Scanlon (1919) 72 Pa. Super. Ct. 43; Commonwealth v. Bayne (1919) 72 Pa. Super. Ct. 44.

If a state statute contains a provision limiting the quantity of liquor which may be delivered to a consignee, and if a state has the power to limit the quantity of liquor which within its jurisdiction can be delivered to a consignee, then the Webb-Kenyon statute would apply and the provisions of the state statute would be in force. Gaines v. Baltimore, etc., Steamship Co. (D. C. S. C. 1916) 234 F. 786.

The state can forbid and punish the transportation of intoxicating liquor across the state and into another state only in case the proposed use in the state into which it was to be taken was contrary to law there, so that the transportation was deprived of the protection of the commerce clause of the federal Constitution by this act. Haumschilt v. State (1920) 221 S. W. 196, 142 Tenn. 520.

Although permit had been issued for shipment of liquor where it was not attached to containers as required by Initiative Measure No. 3 (Laws Wash. 1915, p. 13), § 18, shipment was contrary to laws, and its character as interstate commerce was thereby divested. State v. Great Northern Ry. Co. (1917) 167 P. 1117, 97 Wash. 137, denying rehearing (1917) 165 P. 1073, 97 Wash. 137, and writ of error dismissed Great Northern Ry. Co. v. State of Washington (1920) 40 S. Ct. 177, 251 U. S. 565, 64 L. Ed. 416.

Under Act Cong. June 16, 1906, c. 3335, § 3 (local) Const. Okl. art. 1, § 2, Rev. Laws Okl. 1910, § 3605, and this section, interstate shipment of intoxicating liquors into Oklahoma is unlawful; and since Oklahoma laws forbid manufacture and sale of intoxicating liquors therein, interstate shipments into portion of Oklahoma formerly an Indian Reservation are not authorized, because Indian titles have been extinguished, this section having deprived such shipments of protection arising out of their interstate character. Missouri, K. & T. Ry. Co. v. Danciger (Kan. 1918) 248 F. 36, 160 C. C. A. 176.

28. Seizure and condemnation.—Under this act, that a car load of intoxicating liquor seized in bulk in Kansas, the destination state, was still in course of transportation originating in another state, did not protect the liquor from condemnation consequent on a judicial determination that it was intended for unlawful use in Kansas. State v. Doe (1914) 139 P. 1169, 92 Kan. 212.

This section is independent of and unconnected with the revenue laws of the United States, and does not authorize a state official to seize intoxicating liquors in bond. State v. Intoxicating Liquors (1920) 109 A. 257, 119 Me. 1.

In view of this act liquors not bearing permit under Laws Wash. 1915, c. 2, § 18, held liable to seizure, though shipment originated in Kentucky. State v. Great Northern Ry. Co. (1917) 165 P. 1073, 97 Wash. 137, rehearing denied (1917) 167 P. 1117, 97 Wash. 137, and writ of error dismissed Great Northern Railway Co. v.

State of Washington (1920) 40 S. Ct. 177, 251 U. S. 565, 64 L. Ed. 416.

Shipments of liquor through a state from a place without the state cannot be seized under a state statute by virtue of the Webb-Kenyon Act. State v. Great Northern R. Co. (1917) 97 Wash. 137, 167 P. 103.

If interstate shipment was destined to be delivered in Washington, and defendant railroad had reason to so believe, such liquor could be confiscated within state in view of this section. State v. Great Northern Ry. Co. (1917) 167 P. 103, 98 Wash. 197.

29. Acts and things prohibited.—Under this act and section 390 of Title 18, Criminal Code and Criminal Procedure, and Rem. Code Wash. 1915, §§ 6262—1 to 6262—22, inclusive, it would have been unlawful for a carrier to transport into Washington two carloads of beer consigned to a transfer company, though each package in the shipment contained a permit for delivery to the ultimate consignee, so that the carrier properly required the shipments to be separately billed to the persons named in the permits and could recover from the shipper the difference between the carload and the less than carload rates for the shipment. Rainier Brewing Co. v. Great Northern Pac. S. S. Co. (Wash. 1922) 42 S. Ct. 436, 259 U. S. 150, 66 L. Ed. 868, affirming (C. C. A. Wash. 1921) 270 F. 94.

The Webb-Kenyon Act does not render illegal the shipment of liquor in interstate commerce to a consignee desiring it for his personal use, though without a permit required by the law of his state. Theo. Hamm Brewing Co. v. Chicago, R. I. & P. Ry. Co. (D. C. Minn. 1913) 215 F. 672.

In view of the law of West Virginia, the Webb-Kenyon Act prohibits the delivery by a carrier of liquor transported from without the state to a consignee within the state for his personal use. State of West Virginia v. Adams Express Co. (W. Va. 1915) 219 F. 794, 135 C. C. A. 464, L. R. A. 1916C, 291, reversing (D. C. 1914) 219 F. 331.

In the following cases it was held that liquors purchased for the personal use of a person are not invalidated by the Webb-Kenyon Act when not prohibited by the law of the state where the purchaser lives. Sturgeon v. State (1916) 17 Ariz. 513, 154 P. 1050; Adams Express Co. v. Com. (1913) 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342; Adams Express Co. v. Com. (1914) 160 Ky. 66, 169 S. W. 603; Palmer v. Southern Express Co. (1914) 129 Tenn. 116, 165 S. W. 236. See Adams Express Co. v. Kentucky (Ky. 1915) 238 U. S. 190, 35 S. Ct. 824, 59 L. Ed. 1267, Ann. Cas. 1915D, 1167, L. R. A. 1916C, 273, distinguished in James Clark Distilling Co. v. Western Maryland R. Co. (Md. 1916) 37 S. Ct. 180, 242 U. S. 311, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845.

The Webb-Kenyon law prohibits the entry in interstate commerce of intoxicating liquors for a purpose made unlawful under valid state statutes. Southern Express Co. v. Whittle (1915) 69 So. 652, 194 Ala. 496, L. R. A. 1916C, 278.

The state prohibition statutes and this section do not severally or jointly prohibit transportation of liquor through this state from one state to another, and have no application if permitted by shipping and receiving states. Moragne v. State (1918) 78 So. 450, 201 Ala. 388, denying certiorari (1918) 78 So. 98, 16 Ala. App. 351.

An express company is guilty of a crime in delivering shipments of liquor from another state to a minor in Alabama, under Gen. Acts 1915, p. 43, § 10, and the Webb-Kenyon Act. Perry v. Southern Express Co. (1918) 81 So. 619, 202 Ala. 663.

It was held in Smith v. Southern Express Co. (1914) 166 N. C. 155, 82 S. E. 15, that the act applies to a shipment of liquor to a druggist who has not taken out the license required to bring him within a provision in the state law permitting sales for medicinal purposes. In American Express Co. v. Beer (1914) 107 Miss. 528, 65 So. 575, Ann. Cas. 1916D, 127, it was held that where the state law forbade the having of liquors in possession for personal use in quantities greater than one gallon, an interstate shipment of a greater quantity was unlawful though intended for personal consumption. See, also, U. S. v. Oregon-Washington R., etc., Co. (D. C. Or. 1913) 210 F. 378.

The act applies to a carrier who receives a shipment of liquors to be transported to a place where such transportation is forbidden by the state law. State v. Grier (Del. 1913) 88 A. 579, 4 Boyce, 322. But see Van Winkle v. State (Del. 1914) 91 A. 385, 4 Boyce, 578, Ann. Cas. 1916D, 104, reversing State v. Van Winkle (1913) 88 A. 807, 4 Boyce, 405.

The law applies to the transportation by an agent of a liquor dealer in one state of intoxicating liquor into local option territory of another state, which transportation is forbidden by the laws of the latter state. State v. Grier (Del. 1913) 88 A. 579, 4 Boyce, 322.

A carrier cannot be punished for receiving, carrying, and delivering, as an interstate transaction, intoxicating liquor in local option territory to a consignee who purchased it at a point in another state, and when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the law of this state. If, however, the liquor is intended to be received, possessed, sold, or in any manner used in violation of the law of this state, then the Webb-Kenyon Act applies, although the transaction may be an interstate one.

Adams Express Co. v. Commonwealth (1913) 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342.

Under a state statute prohibiting a carrier from delivering intoxicating liquors in local option territory a carrier is not liable for delivering liquors in the usual course of business to one whom it believed intended them for his personal use, where the state did not prohibit a person from possessing liquors for his personal use, and the carrier was circumspect and used ordinary care to learn for what purpose the liquors delivered were to be used. Adams Express Co. v. Com. (1914) 160 Ky. 66, 169 S. W. 603.

The Webb-Kenyon Act prohibits the shipment of intoxicating liquor into states in which its sale is unlawful, only when the liquor is intended for an unlawful use. Commonwealth v. White (1915) 179 S. W. 469, 166 Ky. 528.

Since the adoption of this section and the sustention of its constitutionality by the Supreme Court of United States, carriers have no right to transport and deliver intoxicants into a state in contravention of its local laws. City of Kirksville v. Warden (1918) 207 S. W. 66, 276 Mo. 105.

Under this section shipments of liquor into city sought to be prohibited by ordinance, but not violating any law of state, were not prohibited. West Jersey & S. R. Co. v. City of Millville (1918) 103 A. 245, 91 N. J. Law, 572.

30. State legislation—In general.—Section 15 of Title 49, Transportation, prohibiting disclosure of information respecting shipments, has been held not paramount to state legislation in respect to shipments of intoxicating liquors in view of this Act. Seaboard Air Line Ry. v. State of North Carolina (1917) 38 S. Ct. 96, 245 U. S. 298, 62 L. Ed. 299, affirming State v. Seaboard Air Line Ry. (1915) 84 S. E. 283, 169 N. C. 295.

This act applies to liquors shipped into West Virginia contrary to a state law, though such law was adopted prior to the federal act. State of West Virginia v. Adams Express Co. (W. Va. 1915) 219 F. 794, 135 C. C. A. 464, L. R. A. 1916C, 291, reversing (D. C. 1914) 219 F. 331.

In West Virginia v. Adams Express Co. (W. Va. 1915) 219 F. 794, 135 C. C. A. 464, L. R. A. 1916C, 291, it was held that the legislature of a state could change the common-law rule so as to make the place of delivery in the state the place of sale.

Code Iowa, § 2419, prohibiting transportation or conveyance of intoxicating liquors to any person within the state, is in full force since the enactment of this section, unless repealed, and receipt of liquor from carrier is a violation thereof. Theo. Hamm Brewing Co. v. Chicago, R. I. & P. Ry. Co. (Ill. 1917) 243 F. 143, 156 C. C. A. 9.

Laws of Oklahoma are held to make the sale of intoxicants illegal, so that the Webb-Kenyon Act applies to shipments to that state. Missouri, etc., R. Co. v. Danciger (Kan. 1918) 248 F. 36, 160 C. C. A. 176.

After the act, it was not necessary for the state to re-enact its laws regulating the sale and transportation of liquors. State v. United States Express Co. (1914) 145 N. W. 451, 164 Iowa, 112.

Though Code Iowa 1897, § 2419, relating to shipments of intoxicating liquor, was held unconstitutional by the United States Supreme Court as interfering with interstate commerce, yet on the enactment of this section it became enforceable, the section having remained as part of the statutory law; and under said section, and despite Code Supp. 1915, §§ 2421a and 2421b, it was held, that a railroad company could not deliver an interstate shipment of intoxicating liquors to an Iowa consignee who was not a permit holder, though the liquors were intended for his personal use. Stajcar v. Dickinson (1918) 169 N. W. 756, 185 Iowa, 49.

"Law of such state" includes a city ordinance. Kansas City v. Jordan (1913) 99 Kan. 814, 163 P. 188, Ann. Cas. 1918B, 273.

The fact that the state law punishing the bringing into local option territory intoxicating liquors, has been adjudged inoperative when applied to interstate shipments protected by the commerce clause of the federal Constitution does not prevent it from becoming operative to a transaction withdrawn from the protection of the commerce clause of this act. Adams Express Co. v. Commonwealth (1913) 157 S. W. 908, 154 Ky. 462.

Under this act, the Legislature has power to adopt a statute prohibiting intoxicating liquors from being imported. Atkinson v. Southern Express Co. (1913) 78 S. E. 516, 94 S. C. 444, 48 L. R. A. (N. S.) 349; Atkinson v. Southern Express Co. (1913) 78 S. E. 520, 94 S. C. 457.

The act does not vitalize a state statute which has been previously declared to be unconstitutional as an interference with the federal power over interstate commerce, though it makes possible the future enactment of a similar statute. Atkinson v. Southern Express Co. (1913) 94 S. C. 444, 78 S. E. 516, 48 L. R. A. (N. S.) 349.

A state has no jurisdiction to punish the bringing into the state from another state of liquor in transit to a third state unless the sale thereof in the state of its destination would be illegal. Haumschilt v. State (1920) 221 S. W. 196, 142 Tenn. 520.

31. —— Validity and effectiveness.—A state law which prohibits the delivery of liquors for the personal use of the consignee, or limits the amount that may be delivered to a consignee for such use is valid under the Webb-Kenyon Act. James Clark Distilling Co. v. Western Maryland R. Co. (Md. 1916) 242 U. S. 311, 37 S. Ct. 180, 61 L. Ed. 326, Ann. Cas. 1917B, 845, L.

R. A. 1917B, 1218, distinguishing Adams Express Co. v. Kentucky (Ky. 1914) 238 U. S. 190, 35 S. Ct. 824, 59 L. Ed. 1267, Ann. Cas. 1915D, 1167, L. R. A. 1916C, 273, which reversed (1914) 160 Ky. 66, 169 S. W. 603; Theo. Hamm Brewing Co. v. Chicago, etc., R. Co. (Ill. 1917) 243 F. 143, 156 C. C. A. 9, reversing (D. C. Minn. 1913) 215 F. 672; State v. Southern Express Co. (1917) 173 N. C. 753, 91 S. E. 706; Brennen v. Southern Express Co. (1916) 106 S. C. 102, 90 S. E. 402.

Pub. Laws N. C. 1913, c. 44, § 5, requiring carriers to keep record of shipments of intoxicating liquor, was held valid as applied to interstate shipments in view of this section. Seaboard Air Line Ry. v. State of North Carolina (1917) 38 S. Ct. 96, 245 U. S. 298, 62 L. Ed. 299, affirming State v. Seaboard Air Line Ry. (1915) 84 S. E. 283, 169 N. C. 295.

Prohibition Act Colo. (Laws 1915, p. 275) § 10, requiring shipments of intoxicating liquors to be marked as such, is invalid, despite this section, in so far as it purports to regulate interstate commerce. Chicago, B. & Q. R. Co. v. Giles (D. C. Colo. 1916) 235 F. 804. See contra State v. Owen (1917) 166 P. 793, 97 Wash. 466.

A state statute taxing an agency of a foreign brewery established in such state, if the tax does not operate as a discrimination, is a valid exercise of the police power of the state and a permissible regulation by the state of the sale of intoxicating liquors shipped from other states under the Wilson and Webb-Kenyon Laws (omitted as superseded). Evansville Brewing Ass'n v. Excise Commission (D. C. Ala. 1915) 225 F. 204.

Acts Ala. 1915, p. 27, § 24, and Acts Ala. 1915, pp. 39, 44, §§ 1, 12, are not invalid, when applied to the interstate transportation of intoxicating liquors over the highways of the state, in view of this section. Moragne v. State (1917) 74 So. 862, 16 Ala. App. 26.

As the Webb-Kenyon Act divested intoxicating liquors of their interstate character, Const. Ariz. art. 23, § 1, prohibiting disposal or introduction into the state of intoxicating liquors, is not an interference with interstate commerce. Sturgeon v. State (1916) 154 P. 1050, 17 Ariz. 513, L. R. A. 1917B, 1230.

The Webb-Kenyon Act, divesting liquor of its interstate character in certain cases, and prohibiting its transportation for use in violation of law, was held not to apply to a delivery in a prohibition district, unless intended for an unlawful use, and otherwise not to remove the protection of the commerce clause, so that Hazel Law (Delaware) prohibiting delivery of liquor for any purpose except to physicians and druggists, was invalid as to a shipment for the receiver's personal consumption, recognized by the act to be lawful. Van Winkle v. State (Del. 1914) 91 A. 385, 4 Boyce, 578, Ann. Cas. 1916D, 104, reversing State v. Van Winkle (1913) 88 A. 807, 4 Boyce, 405. And see Palmer v. Southern Express Co. (1913) 129 Tenn. 116, 165 S. W. 236, wherein a state statute forbidding the importation for personal use of intoxicating liquor in quantities exceeding one gallon, was condemned.

Mahin Act (Kansas) held complementary to Webb-Kenyon Act, and a valid enactment concerning the bringing into the state of intoxicating liquor for unlawful use. State v. Missouri Pac. Ry. Co. (1915) 152 P. 777, 96 Kan. 609, Ann. Cas. 1917A, 612, affirmed Missouri Pac. Ry. Co. v. State of Kansas (1918) 39 S. Ct. 93, 248 U. S. 276, 63 L. Ed. 239, 2 A. L. R. 1589.

Gen. St. Kan. 1909, § 4398, forbidding consignee of liquor to give order on carrier for it, as applied to shipment from another state, is not undue interference with interstate commerce, irrespective of this section. Danciger v. Cooley (1916) 157 P. 453, 98 Kan. 38, rehearing denied (1916) 158 P. 1119, 98 Kan. 484, affirmed (1919) 39 S. Ct. 119, 248 U. S. 319, 63 L. Ed. 266.

An ordinance regulating transportation of intoxicating liquors for legal purposes and prohibiting such transportation for illegal purposes is not unlawful, since under this section there is no interstate commerce in intoxicating liquors except as law of state may recognize legality of sale or transportation. Kansas City v. Jordan (1917) 163 P. 188, 99 Kan. 814.

No state regulation of the shipment of intoxicating liquors is valid unless the shipments to which it applies are intended for use in violation of the state law, and thus specifically within the Webb-Kenyon Act. Commonwealth v. White (1915) 179 S. W. 469, 166 Ky. 528.

Act La. No. 23 of 1915 (Ex. Sess.), regulating shipment of liquors into prohibition parish, is not in violation of Const. U. S. art. 1, § 8, as a regulation of interstate commerce, in view of this section. State v. Selsor (1916) 73 So. 270, 140 La. 468, writ of error dismissed Selsor v. State of Louisiana (1919) 39 S. Ct. 135, 248 U. S. 545, 63 L. Ed. 414.

The requirement of the state law that those transporting liquors into the state keep a record of same and file statements thereof with the clerk of the circuit court, is not invalid as imposing a direct burden on interstate commerce, regardless of whether it is within the Webb-Kenyon Act. American Express Co. v. Beer (1914) 65 So. 575, 107 Miss. 528, L. R. A. 1918B, 446, Ann. Cas. 1916D, 127; Southern Express Co. v. Longinotti (Miss. 1914) 65 So. 583; American Express Co. v. Miller (Miss. 1914) 65 So. 652.

The state law, though imposing a direct burden on interstate commerce, is authorized by the Webb-Kenyon Act, even as applied to liquor being transported for

the personal use of the consignee and his family. Id.

The state law relative to record to be kept by transportation companies of shipments of intoxicating liquors, held not in conflict with the commerce clause of the federal Constitution, in view of Webb-Kenyon Law. State v. Seaboard Air Line Ry. (1915) 84 S. E. 283, 169 N. C. 295, affirmed Seaboard Air Line Ry. v. State of North Carolina (1917) 38 S. Ct. 96, 245 U. S. 298, 62 L. Ed. 299.

A state law, relative to record of shipments of intoxicating liquors, held not void as in conflict with sections 388 and 389 of Title 18, Criminal Code and Criminal Procedure. Id.

A state statute which makes it unlawful to receive more than one quart of intoxicating liquors within fifteen days is a legitimate exercise of police power. Glenn v. Southern Express Co. (1915) 170 N. C. 286, 87 S. E. 136, writ of error dismissed (1917) 38 S. Ct. 133, 245 U. S. 679, 62 L. Ed. 543. See to the same effect Southern Express Co. v. Whittle (1915) 69 So. 652, 194 Ala. 496, L. R. A. 1916C, 278.

Cr. Code S. C. 1912, §§ 794, 814, 825, parts of the dispensary law, were held unconstitutional, in so far as they attempted to prohibit the importation of liquor from another state for personal use, at the time of their adoption, prior to the passage of the act. Atkinson v. Southern Express Co. (1913) 78 S. E. 516, 520, 94 S. C. 444; Atkinson v. Southern Express Co. (1913) 78 S. E. 520, 94 S. C. 457.

Allison Act (Texas) § 5, regulating interstate shipments of liquor, is valid. Ex parte Peede (1914) 170 S. W. 749, 75 Tex. Cr. R. 247.

Acts 35th Leg. Tex. (Fourth Called Sess.) c. 24, § 3, making it unlawful for any railroad to transport within or import into the state intoxicants, or for any person to receive the same or to deliver the same, in so far as it interferes with interstate commerce, is made valid by this act. Gulf, C. & S. F. Ry. Co. v. State (Tex. Civ. App. 1919) 212 S. W. 845.

Prohibition Act, § 39, forbidding the importation of ardent spirits into the state from a point without, is not nullified by Const. U. S. Amend. 18, or the Volstead Act (incorporated in this title); the provision of the Webb-Kenyon Act which under the commerce clause empowered such inhibition by the state, being left in force by the Volstead Act, and section 52 of this title repealing acts only so far as inconsistent therewith. Pollard v. Commonwealth (1922) 110 S. E. 354, 132 Va. 576.

The state law prohibiting the manufacture, keeping, sale, etc., of intoxicating liquors, held not void as an interference with interstate commerce, because expressly permitted by the Webb-Kenyon Act. Gottstein v. Lister (1915) 153 P. 595, 88 Wash. 462, Ann. Cas. 1917D, 1008.

A state statute requiring a permit to be attached to packages of liquor shipped into the state is warranted by the Webb-Kenyon Act. State v. Warburton (1917) 166 P. 615, 97 Wash. 242; State v. Great Northern R. Co. (1917) 97 Wash. 137, 165 P. 1073, rehearing denied (1917) 165 P. 1073, 167 P. 1117, 97 Wash. 137 and writ of error dismissed Great Northern Ry. Co. v. State of Washington (1920) 40 S. Ct. 177, 251 U. S. 565, 64 L. Ed. 416.

A state law forbidding the advertising of liquors for sale in the state, when construed to apply to a nonresident liquor dealer sending advertising matter into the state, held not violation of Const. U. S. art. 1, § 8, in view of the Wilson Act (omitted as superseded) and the Webb-Kenyon Act. State v. Davis (1915) 87 S. E. 262, 77 W. Va. 271, L. R. A. 1917C, 639.

This section does not restrain, limit, or nullify Code Supp. W. Va. 1918, c. 32a, § 31 (sec. 1305e), relating to offense of bringing into state or carriage of more than one quart of liquor per month. Ex parte Pratt (1918) 97 S. E. 301, 83 W. Va. 51.

This section sanctions the imposition of burdens upon the interstate transportation of intoxicating liquors intended "to be received, possessed, sold, or in any manner used" in violation of laws of West Virginia; and the enforcement of the state's prohibition laws does not conflict with commerce clause of federal Constitution. State v. Frazee (1918) 97 S. E. 604, 83 W. Va. 99.

32. —— Construction and application.—A shipment of liquors from one state to another through a third state although by automobile and consequently over public highways is not affected by the liquor laws of the third state, as the shipment is an interstate one. Moragne v. State (1918) 78 So. 98, 16 Ala. App. 351.

In Moragne v. State (1917) 77 So. 322, 200 Ala. 689, L. R. A. 1918E, 948, reversing (1917) 74 So. 862, 16 Ala. App. 26, it was held that the state prohibition statutes as extended by the Webb-Kenyon Act were inapplicable to the transportation of intoxicating liquors through Alabama in transit from Georgia to Florida, and that if such statutes were construed to prohibit the transportation of intoxicating liquors in transit from Georgia to Florida through Alabama they would be unconstitutional.

Mere delivery of liquor in Arkansas by one person to another, entirely disconnected with transporting liquor into Arkansas, is not offense under Acts Ark. 1917, p. 41, § 1, denouncing shipment, transportation, or delivery of intoxicants from another state to another

person in Arkansas. Winfrey v. State (1918) 202 S. W. 23, 133 Ark. 357.

Acts Ark. 1917, p. 41, §§ 1, 17, as to transporting liquor into the state, held not to apply to one who carries liquor into the state for himself for purpose of resale. Rivard v. State (1918) 202 S. W. 39, 133 Ark. 1.

The transportation or carrying of whisky sold by a citizen of Pennsylvania to a citizen of Delaware from the former to the latter state would not be subject to the Delaware statute, except for this act, no matter whether the transportation was by a common carrier or by the personal agent of the seller. State v. Grier (Del. 1913) 88 A. 579, 4 Boyce, 322.

Though the state law, prohibiting the transportation of liquor into prohibition territory, does not apply to interstate commerce, yet when construed in connection with the Webb-Kenyon Law, it is applicable to interstate shipments except those for personal use. Adams Express Co. v. Crigler & Crigler Co. (1914) 170 S. W. 542, 161 Ky. 89.

Sale of beer made during June and July, 1914, by shipping two carloads from Maryland to South Carolina pursuant to written order, was not within Cr. Code S. C. 1912, §§ 794, 829, having been made prior to adoption of Act S. C. Feb. 20, 1915 (29 St. at Large, p. 140), and hence within protection of Interstate Commerce Law (chapter 1 of Title 49, Transportation) which is paramount to state's police power. Monumental Brewing Co. v. Whitlock (1918) 97 S. E. 56, 111 S. C. 198.

33. Rights and duties of carriers.—If a shipment of intoxicating liquors is designed for unlawful use or sale a carrier may refuse to receive it. U. S. v. Oregon-Washington R., etc., Co. (D. C. Or. 1913) 210 F. 378; American Express Co. v. Beer (1914) 107 Miss. 528, 65 So. 575, Ann. Cas. 1916D, 127. Carriers cannot be compelled to accept illegal shipment. Missouri, etc., R. Co. v. Danciger, (Kan. 1918) 248 F. 36, 160 C. C. A. 176. But the acceptance by a carrier of a shipment designed for a lawful purpose may be compelled. Theo. Hamm Brewing Co. v. Chicago, etc., R. Co. (D. C. Minn. 1913) 215 F. 672; James Clark Distilling Co. v. Western Maryland R. Co. (C. C. Md. 1915) 219 F. 333, affirmed 37 S. Ct. 180, 242 U. S. 311, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845; Bristol Distributing Co. v. Southern Express Co. (1915) 117 Va. 7, 83 S. E. 1084.

Where, after the passage of the law, defendant express company refused to receive interstate shipments of liquor for transportation into South Carolina, complainant was not entitled to a temporary restraining order, in a suit to compel the express company to accept further shipments of that character, to which the state of South Carolina or its representative was not a party. H. Clark & Sons v. Southern Express Co. (D. C. Va. 1913) 208 F. 588.

As, under this act, Act S. C. Feb. 20, 1915 (29 St. at Large, p. 140), regulating shipments of intoxicating liquors into state, is invalid only if interfering with some essential constitutional right, a carrier will not by mandatory injunction be required to deliver interstate shipment of liquor in violation of act; its constitutionality being at least doubtful. Gaines v. Baltimore & C. S. S. Co. (D. C. S. C. 1916) 234 F. 786.

Under section 390 of Title 18, Criminal Code and Criminal Procedure, interstate shipments of intoxicating liquors, etc., are prohibited unless each package containing the same "be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein." Under the provisions of that section a common carrier of interstate commerce is therefore apprised, when intoxicating liquor is received by it for shipment, of that fact, and, since the passage of the Webb Law, before it delivers such liquor to the consignee in Alabama it should inform itself as to the purpose of the consignee with reference to the liquor. If it has liquor in its possession in this state for delivery to a person who intends to use it in violation of the law, or actually delivers it in this state to such person, then, presumptively, it has itself been guilty of a violation of the law. Southern Express Co. v. State (1914) 188 Ala. 454, 66 So. 115.

A carrier transporting spirituous or intoxicating liquor into a state which penalizes the selling or possessing of such liquor, contrary to this section cannot collect the rate of freight allowed for the transportation of whisky, though, when it received and transported the shipment, it was wholly ignorant that it was liquor. Clemons v. Payne (1921) 105 S. E. 623, 26 Ga. App. 142.

A carrier to avoid infringement of the act must use reasonable care to ascertain whether a shipment of intoxicating liquor is designed for unlawful use or sale. Adams Express Co. v. Com. (1914) 160 Ky. 66, 169 S. W. 603.

When a railroad discovered that an unmarked trunk checked by a passenger traveling to dry territory contained intoxicating liquor in violation of this section it was excused from transporting and delivering the trunk and its contents in the dry territory. Shannon v. Hines (1921) 226 S. W. 283, 205 Mo. App. 629.

A penalty for nondelivery of liquors cannot be recovered against an interstate carrier where the facts show that the consignee intended the liquors for sale in violation of a state statute, for in such a case the delivery would be unlawful under this act. Smith v. Southern Express Co. (1914) 166 N. C. 155, 82 S. E. 15.

An interstate carrier cannot refuse, under the Webb-Kenyon Act, to accept shipments of intoxicants into North Carolina, where the liquors were intended for personal use, and the importation of liquors for that purpose was not prohibited. Bristol Distributing Co. v. Southern Express Co. (1915) 83 S. E. 1084, 117 Va. 7.

It was duty of defendant railroad to receive at Butte, Mont., for shipment to Alaska consignment of whisky, unless it knew that whisky was intended for delivery within state of Washington, where it would be contraband, if not protected by permit. State v. Great Northern Ry. Co. (1917) 167 P. 103, 98 Wash. 197.

III. DECISIONS UNDER THE REED AMENDMENT

For the text of that portion of the Reed Amendment (Act March 3, 1917, c. 162, § 5, 39 Stat. 1069), which was apparently omitted as superseded, see the historical note to section 1 of this title.

See, also, the notes of decisions under section 341 of Title 18, Criminal Code and Criminal Procedure.

VALIDITY, CONSTRUCTION AND OPERATION

51. Validity.—The Reed Amendment does not violate Const. art. 1, § 9, cl. 6, prohibiting any regulation of commerce which gives a preference to the ports of one state over those of another. Williams v. U. S. (Ind. 1921) 41 S. Ct. 364, 255 U. S. 336, 65 L. Ed. 664.

It is constitutional. Ozello v. U. S. (C. C. A. Ind. 1920) 268 F. 242.

It is not invalid on the ground that its subject-matter is not included in the title of the act, which is "An act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1918, and for other purposes," since "other purposes" includes every possible subject of legislation. Wagman v. U. S. (C. C. A. Mich. 1920) 269 F. 568, certiorari denied (1921) 41 S. Ct. 376, 255 U. S. 572, 65 L. Ed. 792.

52. Effect on other federal statutes.—Internal revenue statutes, penalizing persons for distilling spirituous liquors without giving bond and notice in writing to the collector, etc., were not repealed by this section. Pinasco v. U. S. (C. C. A. Wash. 1920) 262 F. 400.

In view of this section, the Webb-Kenyon Act (omitted as superseded) divesting intoxicating liquors of interstate character in certain cases, did not, since Rev. Laws Okl. 1910, § 3605, made shipments into the state unlawful, repeal Act March 1, 1895, § 8 (omitted), prohibiting interstate shipments of intoxicating liquor into the Indian Territory. Ammerman v. U. S. (C. C. A. Okl. 1920) 267 F. 136, certiorari denied (1920) 41 S. Ct. 147, 254 U. S. 650, 65 L. Ed. 457.

The Webb-Kenyon Act (omitted as superseded) merely reinforcing the state statutes with relation to illicit liquor dealers, and this section giving federal cognizance and fixing a penalty for violation, are merely cumulative, and not out of harmony with applicability of sections 193 and 306 of Title 26, Internal Revenue, the primary purpose of which is revenue, to prohibition states. U. S. v. Lazzaro (D. C. Wash. 1918) 255 F. 237.

The provision of Act March 1, 1895, § 8 (omitted), making it an offense to carry or have carried intoxicating liquors into Indian Territory, held not repealed by implication by this section, but to be still in force in that part of Oklahoma then comprising Indian Territory. U. S. v. Luther (D. C. Okl. 1919) 260 F. 579.

53. Effect on state laws.—This section does not supersede or abrogate a state statute forbidding the bringing of liquor into the state. Ex parte Pratt (1918) 97 S. E. 301, 83 W. Va. 51. See to the same effect Sickel v. Com. (1919) 97 S. E. 783, 99 S. E. 678, 124 Va. 821; New Orleans, etc., R. Co. v. Hanna (1918) 118 Miss. 40, 78 So. 953.

By this section, which followed the Webb-Kenyon Act (omitted as superseded) divesting intoxicating liquors of their interstate character in certain cases, Congress again assumed jurisdiction to regulate the transportation of intoxicants between the states, and, such jurisdiction when exercised being exclusive of the jurisdiction of the states over the subject-matter, the state laws forbidding the importation from another state of intoxicating liquors were superseded or suspended, and one importing liquors from one state into another was punishable under the Reed Amendment alone. People v. Keeley (1921) 181 N. W. 990, 213 Mich. 115.

There is no legal repugnancy or inconsistency between Code Supp. W. Va. 1918, c. 32a, § 31 (sec. 1305e), relating to bringing into state or carriage of more than quart of liquor per month, and this section, so that the former is not superseded, suspended, or abrogated by the latter. Ex parte Pratt (1918) 97 S. E. 301, 83 W. Va. 51.

54. Construction and operation in general.—This section held, in view of the Wilson and Webb-Kenyon Acts (omitted as superseded) not intended merely to aid the state law, but to apply to liquor which a person was bringing in for his own consumption, as allowed by the state law. U. S. v. Hill (W. Va. 1919) 39 S. Ct. 143, 248 U. S. 420, 63 L. Ed. 337.

This section did not cease to be effective with the expiration of the period covered by the appropriation act of which it was a part. Wagman v. U. S. (C. C. A. Mich. 1920) 269 F. 568, certiorari denied (1921) 41 S. Ct. 376, 255 U. S. 572, 65 L. Ed. 792.

Const. Ohio, art. 15, § 9, as amended at the general election in November, 1918, providing that "the sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited," and that "the General Assembly shall enact laws to make this provision effective," and which by the terms of its submission took effect May 27, 1919, became on and after that date the law of the state, within this section, regardless of whether or not the General Assembly had enacted laws for its enforcement. Ahlberg v. U. S. (C. C. A. Ohio, 1921) 271 F. 661.

This section does not apply unless the state, into which intoxicating liquors are transported, shall have prohibited their manufacture or sale throughout the entire state. U. S. v. Collins (D. C. La. 1919) 254 F. 869. To same effect see Laughter v. U. S. (Tenn. 1919) 259 F. 94, 170 C. C. A. 162, certiorari denied (1919) 39 S. Ct. 388, 249 U. S. 613, 63 L. Ed. 802.

This section is highly penal in its nature, therefore to be strictly construed, so that a case to come within its purview must come both within the spirit and letter. Sickel v. Commonwealth (1919) 97 S. E. 783, 99 S. E. 678, 124 Va. 821, writ of error dismissed (1921) 41 S. Ct. 319, 254 U. S. 619, 65 L. Ed. 442.

55. Acts and things prohibited—In general.—This section merely provides that liquor shall not be transported in interstate commerce into any state contrary to the laws of such state. It does not purport to make unlawful the distillation of spirituous liquor. Pinasco v. U. S. (C. C. A. Wash. 1920) 262 F. 400.

The section is not violated unless there is actual transportation of intoxicating liquors from point without to point within state, which has prohibited their manufacture or sale; "into," as used, conveying idea of entrance, passage, or motion. U. S. v. Collins (D. C. La. 1919) 254 F. 869.

The offense of "causing liquor to be transported" in interstate commerce into a prohibition state, under this section, is not committed until the liquor has actually been carried into the latter state. Moran v. U. S. (C. C. A. Tenn. 1920) 264 F. 768.

A purchase of liquor in a state where the purchase is lawful is not converted into an interstate transaction which Congress has power to deal with under the commerce clause of the Constitution, because the purchaser intended to transport the liquor into another state, and will not sustain an indictment for violation of this section. Collins v. U. S. (C. C. A. La. 1920) 263 F. 657.

It has been held that if one transports intoxicating liquors into a state whose laws prohibit their sale and manufacture, but in doing so employs no instrumentality of interstate commerce, he does not violate this section. Sickel v. Commonwealth (1919) 97 S. E. 783, 99 S. E. 678, 124 Va. 821, writ of error dismissed (1921) 41 S. Ct. 319, 254 U. S. 619, 65 L. Ed. 442.

But transportation of intoxicating liquors by automobile from one state to another has been held transportation "in interstate commerce" within the meaning of this section. Ex parte Westbrook (D. C. Fla. 1918) 250 F. 636.

A person who carries liquor in an automobile between two points in the same state cannot be convicted under this section unless it is shown that he knew that the carriage was a link in an interstate transportation of the liquor. Ousler v. U. S. (C. C. A. Tenn. 1920) 263 F. 968.

Defendants who loaded liquor into a motorcar in Florida and attempted to transport same into Georgia were held guilty of violation of this section, though they were arrested before they drove 2 miles. Ex parte Westbrook (D. C. Fla. 1918) 250 F. 636.

Relative to transporting whisky into Tennessee from Missouri, in violation of this section, in the absence of evidence of avulsion, the middle of the navigable channel of the Mississippi as it then existed is to be taken as the state line. Bishop v. U. S. (C. C. A. Tenn. 1919) 259 F. 195.

Defendant having actually transported whisky in his boat across the state line in the Mississippi river into Tennessee, and with intent that it should finally remain in that state, it was immaterial that he had incidentally gone out again with his boat and cargo or that he was outside it when arrested. Id.

Where a defendant, driving an automobile truck, was stopped at the entrance to an interstate bridge by an officer of the other state there stationed, who mounted the truck and commanded defendant to drive across the bridge and to the police station where liquor was found concealed in the truck defendant was held not subject to conviction for interstate transportation of the liquor, under this section. Payne v. U. S. (C. C. A. Neb. 1920) 265 F. 265.

56. —— State into which liquor transported.—This section, which makes it an offense to order, purchase, or cause intoxicating liquors to be transported in interstate commerce into any state whose laws prohibit manufacture or sale, applies if either manufacture or sale is prohibited; conjunctive construction of "or" not being permissible. U. S. v. Collins (D. C. La. 1919) 254 F. 869.

The condition attached to the prohibition is that state shall have prohibited manufacture or sale within entire territory, not merely in parts under local option. Id.

To render this section, applicable to a state, it must have adopted a general policy of prohibition throughout its territory; but it is not essential that such

prohibition should be literally without exception. Laughter v. U. S. (C. C. A. Tenn. 1919) 259 F. 94, certiorari denied (1919) 39 S. Ct. 388, 249 U. S. 613, 63 L. Ed. 802.

Under various statutes of Tennessee, taken together, both the sale and the manufacture of liquor for sale as a beverage are prohibited throughout the state, and the transportation of liquor into the state for beverage purposes is in violation of this section. Id.

Transportation of intoxicating liquors into Texas, which has prohibited their manufacture for beverage purposes, is violation of this section, though there is some ground to believe court of last resort in Texas will hold state prohibitory law unconstitutional, as the federal court will not anticipate and be guided by what the state court might thereafter hold. U. S. v. Collins (D. C. La. 1919) 254 F. 869.

Under this section it is unlawful for interstate carrier to transport for beverage purposes intoxicating liquors from without the state into Texas county which had adopted prohibition, Rev. St. Tex. 1911, art. 5757, declaring sale, etc., within prohibition territory of liquors with intent to violate law to be an offense. McAdams v. Wells Fargo & Co. Express (D. C. La. 1918) 249 F. 175.

57. —— Transportation through state.—This section prohibiting transportation of liquor in interstate commerce "into" any state which prohibits the manufacture, etc., does not include the movement through such state into another. U. S. v. Gudger (Va. 1919) 39 S. Ct. 323, 249 U. S. 373, 63 L. Ed. 653. To same effect see Bishop v. U. S. (Tenn. 1919) 259 F. 195, 170 C. C. A. 263; Preyer v. U. S. (C. C. A. S. C. 1919) 260 F. 157.

It is not a violation of this section to carry intoxicating liquors from a state in which sale was allowed across a state in which sale was prohibited, where the liquor was destined for a third state in which sale was permitted. Berryman v. U. S. (C. C. A. Tenn. 1919) 259 F. 208.

Where defendant was carrying whisky purchased in another state in an automobile within a prohibition state, intending as he claimed to carry it through into another state, an instruction that, if he transferred any part of it into another car within the state, it constituted a violation of this section, regardless of his intention as to future transportation, held erroneous. Durst v. U. S. (C. C. A. S. C. 1920) 266 F. 65.

This section as extended to apply to the District of Columbia, is not violated by a person transporting whisky from Baltimore, through the District, to his home in Virginia, for his personal use. Whiting v. U. S. (1920) 263 F. 477, 49 App. D. C. 225.

Employés on an interstate train passing through the state were passengers, and could not be convicted under the State Prohibition Law by proof that more than one quart of liquor was found in their possession, in the absence of evidence that they intended to dispose of the same while in the state; such employés being protected by the Commerce Clause of the federal Constitution, and this section, not prohibiting the transportation of liquor through a state. Martin v. Commonwealth (1919) 100 S. E. 836, 126 Va. 715.

Transportation of liquors through a state as a mere incident to the transportation into another state, whether such transportation was by personal carriage or by common carrier was not affected by the Reed Amendment. Id.

58. —— Transportation for personal use.—This section prohibits the interstate transportation of liquor by its owner in his own automobile and for his own personal use. U. S. v. Simpson (Colo. 1920) 40 S. Ct. 364, 252 U. S. 465, 64 L. Ed. 665, 10 A. L. R. 510, reversing (D. C. 1919) 257 F. 860.

This section applies to the transportation of liquor on the person for personal use, and as so construed is constitutional, and it is immaterial that the state into which it is carried permits the introduction of liquor for personal use in limited quantities. U. S. v. Hill (W. Va. 1919) 248 U. S. 420, 39 S. Ct. 143, 63 L. Ed. 337.

But it has been held in view of Liquor Law W. Va. § 31, that accused who transported one quart of whisky from Kentucky into West Virginia for his own personal use, did not violate this section, transaction not being interstate commerce. U. S. v. Mitchell (D. C. W. Va. 1917) 245 F. 601.

59. Conspiracy to violate law.—Persons may be indicted under section 88 of this title for a conspiracy to violate this section. Laughter v. U. S. (Tenn. 1919) 259 F. 94, 170 C. C. A. 162, certiorari denied (1919) 39 S. Ct. 388, 249 U. S. 613, 63 L. Ed. 802.

Where the conspiracy alleged was to transport intoxicating liquors from other states into Georgia, where its sale was prohibited, a transportation of liquor from Kentucky and Ohio into Tennessee, where it was seized by the officers, was a sufficient overt act to sustain the conviction, though such transportation was not an offense under this section. Grayson v. U. S. (C. C. A. Tenn. 1921) 272 F. 553, certiorari denied (1921) 42 S. Ct. 49, 257 U. S. 637, 66 L. Ed. 409.

60. Bribery.—Under section 91 of Title 18, Criminal Code and Criminal Procedure, it was not necessary to a conviction for bribery to insure immunity from prosecution for violations of the Reed Amendment, that contraband liquors were actually transported from one state to another or that the officer actually furnished the con-

templated protection, or that he had authority to arrest defendant, as mere passive refraining from making proper reports of violations, or advising the briber when the way was clear from danger of interference by government officials, would be a violation of his official duty, and the offense was complete when the money was paid with intent to influence the officer's duty. Wolf v. U. S. (C. C. A. Tenn. 1923) 292 F. 673.

61. Entrapment.—Under this section, if the authorities had reasonable grounds to suspect defendants were causing whisky to be unlawfully transmitted, and one of them joined with defendants for the purpose of detecting their crime, the officer's acts would not prevent conviction, but if defendants had no intention of committing a crime, and were induced to do so by the officer, they could not be convicted. Billingsley v. U. S. (C. C. A. Mich. 1921) 274 F. 86, certiorari denied (1921) 42 S. Ct. 168, 257 U. S. 656, 66 L. Ed. 420.

62. Forfeitures.—In section 247 of Title 25, Indians, providing for the forfeiture of automobiles or other vehicles used in introducing liquor into the Indian country, "or where the introduction is prohibited by treaty or federal statute," the phrase quoted must be limited to treaties or statutes relating to Indian affairs, to which the statute solely relates, and cannot be extended to apply to vehicles used in introducing liquors into prohibition states in violation of this section. U. S. v. One Buick Automobile (D. C. Colo. 1919) 255 F. 793.

An automobile used to transport liquor into a state the laws of which prohibit its sale, in violation of this section is not subject to seizure and forfeiture by virtue of section 247 of Title 25, Indians, which applies only to introduction of liquor into Indian country "or where the introduction is prohibited by treaty or federal statute" relating to Indian affairs. U. S. v. One Cadillac Eight Automobile (D. C. Tenn. 1918) 255 F. 173.

Intoxicants brought into the District contrary to this section, are not subject to forfeiture under the Sheppard Act (local) providing for the forfeiture of intoxicants illegally received, possessed, etc., since the statutes are independent, and this section clearly defines the punishment which shall be inflicted for its violation. District of Columbia v. Gladding (1920) 263 F. 628, 49 App. D. C. 232; District of Columbia v. Scalco (1920) 263 F. 630, 49 App. D. C. 234.

PROSECUTION AND PUNISHMENT

71. Jurisdiction of prosecution.—A conspiracy to do a certain thing is not ended for all purposes when the plan is completed, but carries on through every act done in the execution of that plan, and a charge of conspiracy to illegally transport liquor from one state into another, and the carriage of the liquor into the latter state, is sufficient to give the court in that district jurisdiction of the offense. Lucas v. U. S. (C. C. A. Colo. 1921) 275 F. 405, certiorari denied (1922) 42 S. Ct. 272, 258 U. S. 620, 66 L. Ed. 795.

This section did not deprive the state of Virginia of jurisdiction to prosecute one who brought intoxicating liquors into the state in violation of prohibition law, where the bringing of such liquor into the state was not shown to constitute interstate commerce. Sickel v. Commonwealth (1919) 97 S. E. 783, 99 S. E. 678, 124 Va. 821, writ of error dismissed (1921) 41 S. Ct. 319, 254 U. S. 619, 65 L. Ed. 442.

72. Pleading and proof in general.—This section was inapplicable, where there was neither allegation nor proof that the transportation was not for one of the excepted purposes. Hunt v. Commonwealth (1920) 101 S. E. 896, 126 Va. 815.

73. Indictment.—An indictment under this section for transporting liquor into a prohibition state, is not fatally defective because it incorrectly states or fails to state the point from which the transportation started. Malcolm v. U. S. (C. C. A. W. Va. 1918) 256 F. 363; Ciafrdini v. U. S. (C. C. A. W. Va. 1920) 266 F. 471, certiorari denied (1920) 41 S. Ct. 8, 254 U. S. 634, 65 L. Ed. 449.

An indictment for violation of this section need not negative the excepted uses, which is matter of defense. U. S. v. Simpson (D. C. Colo. 1919) 257 F. 860, reversed on other grounds (1920) 40 S. Ct. 364, 252 U. S. 465, 64 L. Ed. 665, 10 A. L. R. 510. Contra, Sickel v. Commonwealth (1919) 97 S. E. 783, 99 S. E. 678, 124 Va. 821, writ of error dismissed (1921) 41 S. Ct. 319, 254 U. S. 619, 65 L. Ed. 442.

An indictment for conspiracy to transport intoxicating liquor to a state for use contrary to law need not state the offense which is the object of the conspiracy more specifically than would be required in an indictment charging it as a substantive offense. Hockett v. U. S. (C. C. A. Ariz. 1920) 265 F. 588, certiorari denied Wilson v. U. S. (1920) 41 S. Ct. 13, 254 U. S. 638, 65 L. Ed. 451.

In an indictment for conspiracy to violate this section a charge that the purpose of defendants was to wrongfully, unlawfully, and feloniously transport the liquor is sufficient to import an unlawful motive. Id.

An indictment for conspiracy to transport intoxicating liquors into a dry state need not allege the place from which the liquors were to have been transported, since that need not have been agreed upon, but the purpose may have been to transport them into the state from any place where they could be procured. Id.

An indictment for transporting intoxicating liquor into a state need not negative the exceptions in the statute of liquor intended for scientific, sacramental, medicinal, and mechanical purposes, and therefore an indictment for conspiracy to commit that offense need not negative the exceptions. Id.

An indictment under this section charging the unlawful transportation of "wine," sufficiently negatived the exception excluding "ethyl alcohol for governmental, scientific, sacramental, medicinal, mechanical, manufacturing and industrial purposes." Ozello v. U. S. (C. C. A. Ind. 1920) 268 F. 242.

Under this section the offense of purchasing is complete on purchase for the purpose of transportation, and an indictment therefor need not allege the liquors were actually transported. Tacon v. U. S. (C. C. A. La. 1921) 270 F. 88.

In an indictment charging conspiracy under section 88 of Title 18, Criminal Code and Criminal Procedure, to violate this section by transporting for beverage purposes intoxicating liquors into a state where the sale of such liquors for that purpose was prohibited, it is not necessary to charge that the transportation alleged as the overt act was for beverage purposes, since the overt act need not be in itself criminal. Grayson v. U. S. (C. C. A. Tenn. 1921) 272 F. 553, certiorari denied (1921) 42 S. Ct. 49, 257 U. S. 637, 66 L. Ed. 409.

Indictments held sufficient to charge petitioners with a conspiracy to violate this section, so as to warrant their removal from Georgia to Florida for trial. Williams v. Boswell (C. C. A. Fla. 1919) 255 F. 889.

An indictment charging that defendant purchased intoxicating liquor in one state "to be transported in interstate commerce" for beverage purposes into another state, the laws of which prohibited its manufacture, held to state an offense under this section. U. S. v. Collins (D. C. La. 1919) 264 F. 380.

74. —— **Joinder of counts.**—Counts charging conspiracies to violate the National Prohibition Act (incorporated in this title) and the Reed Amendment may be joined in one indictment, under section 557 of Title 18, Criminal Code and Criminal Procedure, where the acts charged were not disconnected, but were part of the same scheme of unlawful possession and transportation of intoxicating liquor. Powers v. U. S. (C. C. A. Wash. 1923) 293 F. 964.

75. —— **Manner of raising objections.**—In prosecution under this section, the objection could not be raised on writ of error that the indictment charged merely in the language of the statute that defendants caused intoxicating liquors to be transported, without stating in what manner or through what instrumentality it was caused to be done; the indictment not having been challenged by demurrer or otherwise, and defendants not having required, by bill of particulars, amplification of the charge. Ozello v. U. S. (C. C. A. Ind. 1920) 268 F. 242.

76. **Pleas.**—In a prosecution for violation of the Prohibition Law (incorporated in this title), defendant's plea was insufficient to show exclusive federal jurisdiction of the offense, where it was merely alleged that Congress by Reed-Jones Amendment, passed a law regulating the transportation of intoxicating liquors in interstate commerce, the language of the section then following; as the plea should have properly alleged the facts, and that the transportation into the state was not within the exceptions enumerated in the statute. Sickel v. Commonwealth (1919) 99 S. E. 678, 124 Va. 821, affirming on rehearing (1919) 97 S. E. 783, 124 Va. 821, and writ of error dismissed (1921) 41 S. Ct. 319, 254 U. S. 619, 65 L. Ed. 442.

77. **Proof and variance.**—Variance between indictment for transporting liquor into a prohibition state, charging transportation to a certain point therein, and proof that defendant's journey ended two or three miles short of that point, he being arrested on his journey, was immaterial. Bishop v. U. S. (C. C. A. Tenn. 1919) 259 F. 195.

A variance between the indictment and proof regarding the place from which the liquor was transported, is not fatal. Malcolm v. U. S. (C. C. A. W. Va. 1918) 256 F. 363.

Under an information charging defendant with transporting whisky from Baltimore, Md., to Norfolk, Va., it was not necessary to prove the transportation of the whisky from Baltimore, where there was evidence to support a finding that it was transported into Virginia from a point outside that state. Lindsey v. U. S. (C. C. A. Va. 1920) 264 F. 94, certiorari denied (1920) 40 S. Ct. 393, 252 U. S. 583, 64 L. Ed. 727.

In a prosecution for purchasing intoxicating liquors for transportation to a named town in Alabama, testimony by an Alabama sheriff that he seized the liquor at a town of that name in Louisiana was manifestly a mistake, since the sheriff would not be acting outside of the state, and as standard maps showed that town was located in Alabama, it was held that the testimony did not establish a variance. Tacon v. U. S. (C. C. A. La. 1921) 270 F. 88.

78. **Evidence—Admissibility.**—In a prosecution for unlawfully transporting liquor into a prohibition state by automobile, evidence of a prior trip made by the same persons between the same places a few days before, and connected with the

one charged, was held admissible, as a part of the same scheme, and as showing motive and intent. Malcolm v. U. S. (C. C. A. W. Va. 1918) 256 F. 363.

Testimony that the owner of whisky was expected, by those taking it by boat from Missouri down the Mississippi, to meet them at one of two points in Tennessee, with two trucks on which to unload it, was evidence that it was intended for transportation into Tennessee, for permanent stay there, in violation of this section. Bishop v. U. S. (C. C. A. Tenn. 1919) 259 F. 195.

Statement of helper, in presence of owner of boat, and not questioned by him, when officers came on board and asked the destination of whisky thereon, that they expected the owner of the whisky to meet them at one of two points in Tennessee with two trucks on which to unload it, was held admissible against the boat owner, prosecuted for transporting the whisky into Tennessee in violation of this section. Id.

Where there was evidence that two packages containing whisky came by mail from Cincinnati to a point in West Virginia to fictitious addresses, but each in care of a post office box, one rented by a brother of defendant, a tailor, and the other by an employé of his, that on the same and the preceding day both the brother and employé sent telegrams to defendant in Cincinnati, inferentially relating to the shipments, and that the packages were addressed by direction of defendant, testimony of a government agent that he found a large quantity of whisky in the brother's shop was held relevant and competent. Ciafirdini v. U. S. (C. C. A. W. Va. 1920) 266 F. 471, certiorari denied (1920) 41 S. Ct. 8, 254 U. S. 634, 65 L. Ed. 449.

In a prosecution for transporting liquor into a prohibition state, where it was shown that two packages of whisky were received by mail, testimony that similar packages had previously been received addressed to the same post office boxes was held admissible. Id.

On trial of defendant for illegal transportation of liquor into a prohibition state evidence of facts and circumstances tending to show that he was then engaged in a continuing traffic of the kind was held competent as affecting the question of intent, although it tended to show guilt of other offenses. Wagman v. U. S. (C. C. A. Mich. 1920) 269 F. 568, certiorari denied (1921) 41 S. Ct. 376, 255 U. S. 572, 65 L. Ed. 792.

In a prosecution in the United States court for unlawfully transporting intoxicating liquor in interstate commerce a judgment of the state court, acquitting defendants of transporting the liquor into a county to be illegally kept, stored, or sold, which was rendered upon a general verdict without any special finding of facts, is not admissible as evidence of defendant's innocence, since defendant could have been innocent of the offense against the state law, and yet have been guilty of the offense against the federal statute. Martin v. U. S. (C. C. A. Neb. 1921) 271 F. 685.

In a prosecution for unlawfully transporting intoxicating liquors into the state, where the defense was that accused was entrapped into the offense by officers, evidence tending to show similar transactions by defendants before the earliest date mentioned in the indictment is admissible to establish the good faith of the officers in co-operating with defendants in the unlawful transactions for the purpose of detecting the crime. Billingsley v. U. S. (C. C. A. Mich. 1921) 274 F. 86, certiorari denied (1921) 42 S. Ct. 168, 257 U. S. 656, 66 L. Ed. 420.

In such prosecution where the accused claimed that they had been engaged in the grocery business, and were entrapped by the officers into committing the offenses charged, declarations by defendants that their grocery business was ostensible only, and that for years they had been engaged in unlawful transactions of the character charged, are admissible against them, though they related to other transactions than those charged in the indictment. Id.

Evidence tending to show similar transactions by defendants before the officers began co-operating with them was admissible to show good faith of the officers, though it was insufficient to establish the guilt of defendants, and merely created suspicion against them. Id.

An account kept by the seller of the whisky in a fictitious name was admissible against defendants, after evidence was introduced identifying the defendants as those who purchased some of the goods under that account, since the jury could find therefrom, in the absence of evidence to the contrary that the defendants had opened the account in that name, and continued to purchase the whisky shown thereon from the date of the first transaction. Id.

Account books kept by the seller of the whisky unlawfully transported, which were identified by a witness as those kept in the regular course of business by a person employed for that purpose, are admissible against defendants, though the witness did not make all or any of the entries therein, and though he did not have any recollection with reference to the particular transactions. Id.

In a prosecution under this section evidence of the purchase by defendants of whisky in another state is competent, as showing an incident of its unlawful transportation into the state. Id.

79. —— Sufficiency.—Verdict may rest upon rightful inference, as well as upon direct testimony. Robillo v. U. S. (C. C. A. Tenn. 1919) 259 F. 101.

Proof that defendants loaded liquor into an automobile in Mississippi, and had carried it across into Tennessee, along the highway to Memphis, when arrested, was held sufficient to sustain a conviction for violation of this section, although in following the road they were about to cross the line again into Mississippi; there being evidence to warrant a finding that their intended destination was Memphis. Jones v. U. S. (C. C. A. Tenn. 1919) 259 F. 104.

Evidence held to support conclusion that defendant had actually transported liquor across the state line in the Mississippi river into Tennessee, and with intent that it should finally remain there. Bishop v. U. S. (C. C. A. Tenn. 1919) 259 F. 195.

In a prosecution for violating this section brought against defendants, who claimed that the whisky which they procured in Kentucky and transported into Tennessee was destined for Arkansas, evidence held sufficient to sustain a conviction. Berryman v. U. S. (C. C. A. Tenn. 1919) 259 F. 208.

In prosecution under this section evidence held sufficient to corroborate the confession of the defendant that he had brought the liquor from another state. Id.

Labels on packages and bottles of whisky, which defendant and others were loading into an automobile near a wharf, and the identity in marks and other respects with other whisky found in a scow near the wharf, held to justify a finding that the whisky was transported from without the state into the state of Virginia. Lindsey v. U. S. (C. C. A. Va. 1920) 264 F. 94, certiorari denied (1920) 40 S. Ct. 393, 252 U. S. 583, 64 L. Ed. 727.

The possession by defendant and his associates of whisky transported by them from a wharf to a nearby automobile, with nothing to show any intervening possession or control, justifies the legitimate inference that they transported it into the state, where other evidence supports a finding that it had been transported into the state by some one. Id.

Conviction of defendant for violation of this section by causing liquor to be transported into a prohibition state, held not sustained by evidence which failed to show that defendant's agent, who was transporting the liquor, had reached the state line when his vehicle was seized by officers who themselves took it the remainder of the way. Berman v. U. S. (C. C. A. Ind. 1920) 265 F. 259.

A conviction for conspiracy to transport liquor into a prohibition state, in violation of this section held sustained by evidence tending to show that defendant, who was a wholesale dealer in Missouri, had made an arrangement with a customer in Omaha, pursuant to which on three occasions he delivered to an agent of such customer an automobile load of whisky, knowing that it was to be transported to Omaha in a prohibition state. Block v. U. S. (C. C. A. Neb. 1920) 267 F. 524.

In prosecution for violating this section evidence that the defendant was a Pullman car porter on a run extending through the state, and that the liquor was found in his possession on the car, held insufficient to warrant the inference that the liquor was destined for points within the state, and therefore insufficient to sustain a conviction. Preyer v. U. S. (C. C. A. S. C. 1920) 269 F. 381.

In a prosecution for conspiracy to purchase intoxicating liquors for transportation in interstate commerce, which alleged as one overt act joint purchase by two defendants, evidence that one of the named defendants gave the order for the liquor, and that the other paid therefor partly with money of each defendant, sufficiently shows a joint purchase, since it connected both defendants with the act, and in any event the act of either in pursuance of the conspiracy would have been the act of both. Tacon v. U. S. (C. C. A. La. 1921) 270 F. 88.

80. Questions for jury.—Evidence in a prosecution for introducing liquors into a prohibition state held sufficient to justify submission of the case to the jury. Weems v. U. S. (C. C. A. Okl. 1919) 257 F. 57.

Evidence, including the undenied fact that defendants were arrested in a prohibition state with two automobiles loaded with liquor, near the boundary of a state which was not prohibition, held sufficient to justify submission to the jury of defendants' guilt of illegally bringing the liquor into the state. Knowlton v. U. S. (C. C. A. Or. 1920) 269 F. 386.

81. Instructions.—On trial of a defendant for aiding in interstate transportation of liquor in violation of this section, by carrying the liquor in an automobile from a railroad station, where it had been unloaded, to another point in the same state, refusal to charge that defendant could not be convicted unless he had knowledge of the interstate character of the shipment, and that it was still in course of transportation and had not reached its intended destination, was held error. Ousler v. U. S. (C. C. A. Tenn. 1920) 263 F. 968.

On trial of defendant in a federal court in Tennessee, charged with violation of this section, by purchasing whisky in Missouri and causing it to be transported into Tennessee, where defendant was arrested in Mississippi with whisky in his possession, an instruction that defendant

was guilty if the whisky was purchased by some one in Missouri to be shipped to Tennessee, and after it reached a point in Mississippi defendant was hired to carry it from there to another point in Mississippi and there deliver it to a person from Tennessee, was held erroneous, as ignoring the essential element of guilty knowledge of defendant, and also as not defining an offense within the jurisdiction of the court. Moran v. U. S. (C. C. A. Tenn. 1920) 264 F. 768.

On trial of a defendant in a federal court in Tennessee for violation of this section, an instruction that he was guilty if he ordered whisky from a place in Missouri to be brought into Tennessee held erroneous, as not limited to an offense committed within the jurisdiction of the court; defendant having been arrested, with whisky in his possession, in another state, and there being no evidence that it was ever in Tennessee. Id.

In a prosecution for violating this section by bringing into the District of Columbia whisky in half-pint bottles, an instruction that in practically all bootlegging cases tried in that court the whisky was found in half-pint bottles, and that the jury might take such fact into consideration in determining the present case, was prejudicial error, where there was no evidence regarding the facts shown in other cases. Whiting v. U. S. (1920) 263 F. 477, 49 App. D. C. 225.

Charge in prosecution for introducing intoxicating liquors into Oklahoma held not erroneous, as placing burden on defendant, in view of charge on reasonable doubt. Bandy v. U. S. (Okl. 1917) 245 F. 38, 157 C. C. A. 394.

82. Sentence and punishment.—In prosecution for violation of this section, sentence of confinement in certain county jail, which was within the district, was not objectionable, as not specifying any state, as section 696 of Title 18, Criminal Code and Criminal Procedure, authorizing the Attorney General to arrange for the confinement of prisoners in a suitable jail out of the district, if there is no suitable jail in the district, indicates that, where there is a suitable jail in the district, confinement shall be there, and, even if it turned out that the jail designated was not a suitable place, this would not vitiate the sentence, but the Attorney General might designate another. Ozello v. U. S. (C. C. A. Ind. 1920) 268 F. 242.

83. Review.—Conviction of bribing officer to permit violation of this section reversed. Wallace v. U. S. (C. C. A. Tenn. 1923) 291 F. 972.

84. Conviction as bar.—A conviction of transporting liquor into prohibition territory is not a bar to a prosecution under the state law for unlawfully having the liquor in possession in the state to which it was so transported. Heier v. State (1921) 133 N. E. 200, 191 Ind. 410.

IV. DECISIONS UNDER THE WAR TIME PROHIBITION ACT

The so-called War Time Prohibition Act (part of Act Nov. 21, 1918, c. 212, § 1, 40 Stat. 1047) was apparently omitted from the Code as temporary. See the historical note to section 1 of this title.

101. Historical background.—Until passage of National Prohibition Act (incorporated in this title) or War Prohibition Act which it amended, all federal laws relating to manufacture and sale of intoxicating liquors were purely revenue laws. People v. Moody (D. C. Ill. 1925) 9 F.(2d) 628.

102. Validity.—See Dryfoos v. Edwards (N. Y. 1920) 251 U. S. 264, 40 S. Ct. 141, 64 L. Ed. 260, affirming (D. C. 1919) 284 F. 596; Hamilton v. Kentucky Distilleries & Warehouse Co. (Ky. 1920) 40 S. Ct. 106, 251 U. S. 146, 64 L. Ed. 194; Rose v. U. S. (C. C. A. Ohio, 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed. 419; U. S. v. Ranier Brewing Co. (D. C. Cal. 1919) 259 F. 359, writ of error dismissed (C. C. A. 1919) 260 F. 1022; U. S. v. Baumgartner (D. C. Cal. 1919) 259 F. 722; Scatena v. Caffey (D. C. N. Y. 1919) 260 F. 756; Hannah & Hogg v. Clyne (D. C. Ill. 1919) 263 F. 599; Maryland Distilling Co. of Baltimore City v. Miles (D. C. Md. 1919) 263 F. 597; U. S. v. Minery (D. C. Conn. 1919) 259 F. 707; Jacob Hoffmann Brewing Co. v. McElligott (D. C. N. Y. 1919) 259 F. 321, modified (C. C. A. 1919) 259 F. 525.

103. Effect of Eighteenth amendment.—See Hamilton v. Kentucky Distilleries & Warehouse Co. (Ky. 1919) 40 S. Ct. 106, 251 U. S. 146, 64 L. Ed. 194; Dryfoos v. Edwards (N. Y. 1920) 251 U. S. 264, 40 S. Ct. 141, 64 L. Ed. 260, affirming (D. C. 1919) 284 F. 596; Hannah & Hogg v. Clyne (D. C. Ill. 1919) 263 F. 599; U. S. v. Minery (D. C. Conn. 1919) 259 F. 707.

104. Repeal of War Time Prohibition Act.—As to repeal by National Prohibition Act (incorporated in this title) see Ford v. U. S. (C. C. A. Tex. 1921) 269 F. 609; Maresca v. U. S. (C. C. A. N. Y. 1921) 277 F. 727, certiorari denied (1922) 42 S. Ct. 183, 257 U. S. 657, 66 L. Ed. 420; Vincenti v. U. S. (C. C. A. Md. 1921) 272 F. 114, certiorari denied (1921) 41 S. Ct. 538, 256 U. S. 700, 65 L. Ed. 1178.

105. Termination by ending of war.—See Hamilton v. Kentucky Distilleries & Warehouse Co. (Ky. 1920) 40 S. Ct. 106, 251 U. S. 146, 64 L. Ed. 194; Dryfoos v. Edwards (D. C. N. Y. 1919) 284 F. 596, affirmed Hamilton v. Kentucky Distilleries & Warehouse Co. (1919) 40 S. Ct. 106, 251 U. S. 146, 64 L. Ed. 194, and Ruppert v. Caffey (1920) 40 S. Ct. 141, 251 U. S. 264, 64 L. Ed. 260; Vincenti v. U. S. (C. C. A.

Md. 1921) 272 F. 114, certiorari denied (1921) 41 S. Ct. 538, 256 U. S. 700, 65 L. Ed. 1178; Weisman v. U. S. (C. C. A. Ill. 1921) 271 F. 944; Hannah & Hogg v. Clyne (D. C. Ill. 1919) 263 F. 599; Simon v. Moore (D. C. Mo. 1919) 261 F. 638; U. S. v. Minery (D. C. Conn. 1919) 259 F. 707.

106. Repeal of prior laws.—This act either suspended sections 97, 98 and 202–205 of Title 26, Internal Revenue, and Act Feb. 24, 1919, § 1001 (repealed), for the payment of special taxes on retail liquor dealers, or changed the character of the exactions provided in those sections from special taxes to penalties, and in either event those exactions could not be collected by distraint. Thome v. Lynch (D. C. Minn. 1921) 269 F. 995.

As to Rev. St. § 3082 (since expressly repealed) see Goldberg v. U. S. (C. C. A. Minn. 1921) 277 F. 211; Bank v. U. S. (C. C. A. Minn. 1921) 277 F. 220; Weisman v. U. S. (C. C. A. Minn. 1921) 277 F. 221.

Every offense committed under Lever Act, § 15 (temporary) was punishable under this act, and with a lesser penalty, and to that extent the two acts were inconsistent, and the latter act superseded or repealed section 15 of the former, and this would be also true if the latter act increased the penalty. Maresca v. U. S. (C. C. A. N. Y. 1921) 277 F. 727, certiorari denied (1922) 42 S. Ct. 183, 257 U. S. 657, 66 L. Ed. 420.

This act did not repeal section 404 of Title 26, Internal Revenue, which provided a penalty for removal of intoxicating liquors from distillery warehouse without payment of tax provided by section 243 of Title 26. Id.

This act did not repeal sections 193 and 406 of Title 26, Internal Revenue, which required the payment of tax for carrying on the business of wholesale liquor dealer; it still being lawful to sell liquor for all but beverage purposes. Id.

Rev. St. § 3244 (sections 202–205, 791 and 799 of Title 26, Internal Revenue), imposing a special tax on "retail liquor dealers," who are defined as those who sell distilled spirits in less quantities than five gallons at one time, and which required the tax to be paid, not only by persons engaged exclusively in the sale of liquor, but also by druggists and others who, in connection with their other business, sold liquor for medicinal, mechanical, or other purposes, was not repealed by this act. Goldberg v. U. S. (C. C. A. Ga. 1922) 280 F. 89, certiorari denied (1922) 43 S. Ct. 92, 260 U. S. 728, 67 L. Ed. 484.

In a prosecution for selling liquor without having paid the special tax required by Act Feb. 24, 1919, § 1001 (repealed) and this act, a contention that these acts were repealed was without merit, in view of section 29 of Title 1, General Provisions, providing that the repeal of a statute shall not have the effect of extinguishing any penalty or liability incurred thereunder unless the repealing act shall so expressly provide. Yucas v. U. S. (C. C. A. Ill. 1922) 283 F. 20.

The general provision of section 371 of Title 28, Judicial Code and Judiciary, that exclusive jurisdiction of all crimes and offenses cognizable under authority of the United States, unless otherwise provided, is vested in the courts thereof, is left undisturbed by this act. Ex parte Guerra (1920) 110 A. 224, 94 Vt. 1, 10 A. L. R. 1560.

107. Effect of act generally.—See Thome v. Lynch (D. C. Minn. 1921) 269 F. 995; State v. Fisher (Del. 1920) 111 A. 432, 1 W. W. Harr. 121.

108. Intoxicating character and kinds of liquor prohibited.—See U. S. v. Standard Brewery (Md. 1920) 40 S. Ct. 139, 251 U. S. 210, 64 L. Ed. 229, affirming (D. C. 1919) 260 F. 486; Maresca v. U. S. (C. C. A. N. Y. 1921) 277 F. 727, certiorari denied (1922) 42 S. Ct. 183, 257 U. S. 657, 66 L. Ed. 420; U. S. v. Petts (D. C. Mass. 1919) 260 F. 663; Jacob Hoffman Brewing Co. v. McElligott (C. C. A. N. Y. 1919) 259 F. 525, modifying (D. C. 1919) 259 F. 321; U. S. v. Ranier Brewing Co. (D. C. Cal. 1919) 259 F. 359, writ of error dismissed (C. C. A. 1919) 260 F. 1022; U. S. v. Baumgartner (D. C. Cal. 1919) 259 F. 722; U. S. v. Schmander (D. C. Conn. 1919) 258 Fed. 251; (1919) 31 Op. Atty. Gen. 498; (1919) 31 Op. Atty. Gen. 491.

109. Sale of warehouse certificates.—See (1919) 32 Op. Atty. Gen. 28.

110. Storage of liquors.—See Murphy v. St. Joseph Transfer Co. (Mo. App. 1921) 235 S. W. 138.

111. Removal from bonded warehouse.—See Parilla v. U. S. (C. C. A. Ohio, 1922) 280 F. 761; Fitzhugh v. Mitchell (D. C. Cal. 1922) 277 F. 966; See Corneli v. Moore (D. C. Mo. 1920) 268 F. 993, affirmed (1922) 42 S. Ct. 176, 257 U. S. 491, 66 L. Ed. 332.

112. Restraining prosecutions.—See Jacob Hoffmann Brewing Co. v. McElligott (C. C. A. N. Y. 1919) 259 F. 525, modifying (D. C. 1919) 259 F. 321.

113. Indictment and information.—See U. S. v. Standard Brewery (Md. 1920) 40 S. Ct. 139, 251 U. S. 210, 64 L. Ed. 229, affirming (D. C. 1919) 260 F. 486; Maresca v. U. S. (C. C. A. N. Y. 1921) 277 F. 727, certiorari denied (1922) 42 S. Ct. 183, 257 U. S. 657, 66 L. Ed. 420; U. S. v. Bergner & Engel Brewing Co. (D. C. Pa. 1919) 260 F. 764; U. S. v. Pittsburgh Brewing Co. (D. C. Pa. 1919) 260 F. 762; U. S. v. Baumgartner (D. C. Cal. 1919) 259 F. 722; U. S. v. Schmander (D. C. Conn. 1919) 258 F. 251.

114. Evidence.—See Rose v. U. S. (C. C. A. Ohio, 1921) 274 F. 245, certiorari denied (1921) 42 S. Ct. 97, 257 U. S. 655, 66 L. Ed.

419; Ford v. U. S. (C. C. A. Tex. 1921) 269 F. 609.

115. Seizure and forfeiture.—See (1919) 31 Op. Atty. Gen. 392; (1919) 31 Op. Atty. Gen. 442.

116. Effect as to internal revenue taxes.—See Pinasco v. U. S. (C. C. A. Wash. 1920) 262 F. 400; Maresca v. U. S. (C. C. A. N. Y. 1921) 277 F. 727. Certiorari denied (1922) 42 S. Ct. 183, 257 U. S. 657, 66 L. Ed. 420.

117. Operation and effect of state laws.—See State v. Fisher (Del. Gen. Sess. 1920) 111 A. 432, 1 W. W. Harr. 121. Woodruff v. Town of West Orange (1922) 117 A. 835, 97 N. J. Law, 465; Ex parte Guerra (1920) 110 A. 224, 94 Vt. 1, 10 A. L. R. 1560; Wilson v. Board of Com'rs of Jersey City (1920) 109 A. 364, 94 N. J. Law, 119, reversing Wilson v. Com'rs of Jersey City (Sup. 1919) 107 A. 797; State v. Brothers (1919) 175 N. W. 685, 144 Minn. 337. State v. Hosmer (1919) 175 N. W. 683, 144 Minn. 342. State v. George (Mo. App. 1922) 243 S. W. 948; Petition of Burkel for Refund of License Fee (1920) 74 Pa. Super. Ct. 416.

118. Contracts.—As to recovery on contract, see Harkins v. Provenzo (Sup. 1921) 189 N. Y. S. 258, 116 Misc. Rep. 61.

As to excuse for performance, see Brauer v. Hyman (1923) 98 N. J. Law, 743, 121 A. 667.

V. DECISIONS UNDER NATIONAL PROHIBITION ACT, TITLE I

Title I of the National Prohibition Act (Act Oct. 28, 1919, c. 85) was apparently omitted from the Code as temporary and obsolete. See the historical note to section 1 of this title.

131. Constitutionality.—See Jacob Ruppert v. Caffey (N. Y. 1920) 40 S. Ct. 141, 251 U. S. 264, 64 L. Ed. 260, affirming Dryfoos v. Edwards (D. C. 1919) 284 F. 596, which was affirmed Hamilton v. Kentucky Distilleries & Warehouse Co. (1919) 40 S. Ct. 106, 251 U. S. 146, 64 L. Ed. 194; Crosland v. Dyson (C. C. A. Fla. 1922) 280 F. 105, certiorari denied (1922) 43 S. Ct. 93, 260 U. S. 732, 67 L. Ed. 486; Scatena v. Caffey (D. C. N. Y. 1919) 260 F. 756.

132. Expiration of effective force of provisions.—See Hannah & Hogg v. Clyne (D. C. Ill. 1919) 263 F. 599; Dryfoos v. Edwards (D. C. N. Y. 1919) 284 F. 596, affirmed Hamilton v. Kentucky Distilleries & Warehouse Co. (1919) 40 S. Ct. 106, 251 U. S. 146, 64 L. Ed. 194, and Ruppert v. Caffey (1920) 40 S. Ct. 141, 251 U. S. 264, 64 L. Ed. 260.

133. Repeal of War-Time Prohibition Act.—See Vincenti v. U. S. (C. C. A. Md. 1921) 272 F. 114, certiorari denied (1921) 41 S. Ct. 538, 256 U. S. 700, 65 L. Ed. 1178; Maresca v. U. S. (C. C. A. N. Y. 1921) 277 F. 727, certiorari denied (1922) 42 S. Ct. 183, 257 U. S. 657, 66 L. Ed. 420.

134. Authority of prohibition agents.—See Blackman v. Mellon (D. C. N. Y. 1924) 5 F.(2d) 987.

135. Restraining enforcement.—See Griesedieck Bros. Brewery Co. v. Moore (D. C. Mo. 1919) 262 F. 582, appeal dismissed Moore v. Griesedieck Bros. Brewery Co. (C. C. A. 1921) 277 F. 1019; Hannah & Hogg v. Clyne (D. C. Ill. 1919) 263 F. 599.

136. Refund to license holder under state statute.—See Engel v. Baltimore (1922) 140 Md. 284, 117 A. 901.

137. Prosecution by information.—See U. S. v. Achen (D. C. N. Y. 1920) 267 F. 595; Young v. U. S. (C. C. A. Cal. 1921) 272 F. 967.

138. Nuisances.—As to sufficiency of information, see Young v. U. S. (C. C. A. Cal. 1921) 272 F. 967.

As to sufficiency of evidence, see Young v. U. S. (C. C. A. Cal. 1921) 272 F. 967.

As to temporary injunction, see U. S. v. Schott (D. C. Pa. 1920) 265 F. 429.

VI. DECISIONS UNDER REVENUE ACT 1917, § 301 (REPEALED)

See the historical note to section 1 of this title.

151. Wines, vermuth, ginger cordial.—As distilled spirits within the law, see (1918) 31 Op. Atty. Gen. 236.

152. Importation for other than beverage purposes.—See (1917) 31 Op. Atty. Gen. 180.

153. Spirits produced in West Indian Islands.—See (1917) 31 Op. Atty. Gen. 180.

154. Alcohol brought from Porto Rico.—See (1917) 31 Op. Atty. Gen. 196.

155. Forfeiture of spirits.—See (1919) 31 Op. Atty. Gen. 392.

VII. DECISIONS UNDER REVENUE ACT 1918, § 601

For the text of section 601 of the Revenue Act of 1918, apparently omitted from the Code as superseded, see the historical note to section 1 of this title.

171. Smuggling.—Under this section whisky may be lawfully imported, and is therefore a "commodity of merchandise," embraced within the commercial regulations, and its smuggling is punishable. U. S. v. Powers (D. C. Wash. 1920) 263 F. 724.

CHAPTER 3.—INDUSTRIAL ALCOHOL

Sec.
71. Definitions.
72. Plants and warehouses; registration of plants; applications; bonds; permits.
73. Establishment of warehouses.
74. Transfer of alcohol to other plants or warehouses.
75. Tax on alcohol.
76. Withdrawal of distilled spirits from bonded warehouses for denaturing or deposit in warehouse established under chapter.
77. Operation of distillery or bonded warehouse as industrial-alcohol plant or bonded warehouse therefor.
78. Production, use, or sale of alcohol.
79. Exemption of plants and warehouses from certain laws.
80. Establishment of denaturing plants; sale of denatured alcohol tax free; distilled vinegar.
81. Withdrawal of alcohol tax free for denaturing and other enumerated purposes.
82. Penalties.
83. Regulations for establishment, bonding, and operation of industrial-alcohol plants, denaturing plants, and bonded warehouses.
84. Refund of tax on alcohol for loss, evaporation, shrinkage, or leakage.
85. Punishment for unlawful operation of industrial-alcohol plant or denaturing plant.
86. Collection of tax on alcohol.
87. Release of property seized.
88. Applicability of administrative provisions of internal revenue laws.
89. Repeal of laws relating to alcohol.

Section 71. Definitions. When used in this chapter the term "alcohol" means that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, from whatever source or whatever processes produced.

The term "container" includes any receptacle, vessel, or form of package, tank, or conduit used or capable of use for holding, storing, transferring, or shipment of alcohol. (Oct. 28, 1919, c. 85, Title III, § 1, 41 Stat. 319.)

§ 72. Plants and warehouses; registration of plants; applications; bonds; permits. Any person establishing a plant for the production of industrial alcohol shall, before operation, make application to the commissioner for registration of his plant, file bond, and receive permit for the operation of such plant. (Oct. 28, 1919, c. 85, Title III, § 2, 41 Stat. 319.)

Historical Note

Prior to its incorporation into the Code, this section contained further provisions for the registration of plants, and bonding of premises of persons "now" producing alcohol. They were evidently omitted as temporary and obsolete.

Notes of Decisions

See, also, notes to section 16 of this title.

1. Refusal of permit.—Refusal to approve applications for permits to operate industrial and denatured alcohol plants and bonded warehouses held not arbitrary. Chicago Grain Products Co. v. Blair (D. C. Ill. 1926) 12 F.(2d) 90.

§ 73. Establishment of warehouses. Warehouses for the storage and distribution of alcohol to be used exclusively for other than beverage purposes may be established upon filing of application and bond, and issuance of permit at such places, either in connection with the manufacturing plant or elsewhere, as the commissioner may determine; and the entry and storage of alcohol therein, and the withdrawals of alcohol therefrom shall be made in such containers

and by such means as the commissioner by regulation may prescribe. (Oct. 28, 1919, c. 85, Title III, § 3, 41 Stat. 319.)

Notes of Decisions

1. **Refusal of permit.**—Refusal to approve applications for permits to operate industrial and denatured alcohol plants and bonded warehouses held not arbitrary. Chicago Grain Products Co. v. Blair (D. C. Ill. 1926) 12 F.(2d) 90.

2. **Revocation of permit.**—The Commissioner of Internal Revenue is indispensable party to suit to have declared void acts of his subordinates revoking permit to operate denaturing plant and bonded warehouse. Alcohol Warehouse Corporation v. Canfield (C. C. A. N. Y. 1926) 11 F. (2d) 214.

§ 74. **Transfer of alcohol to other plants or warehouses.** Alcohol produced at any registered industrial-alcohol plant or stored in any bonded warehouse may be transferred under regulations to any other registered industrial-alcohol plant or bonded warehouse for any lawful purpose. (Oct. 28, 1919, c. 85, Title III, § 4, 41 Stat. 320.)

§ 75. **Tax on alcohol.** Any tax imposed by law upon alcohol shall attach to such alcohol as soon as it is in existence as such, and all proprietors of industrial-alcohol plants and bonded warehouses shall be jointly and severally liable for any and all taxes on any and all alcohol produced thereat or stored therein. Such taxes shall be a first lien on such alcohol and the premises and plant in which such alcohol is produced or stored, together with all improvements and appurtenances thereunto belonging or in any wise appertaining. (Oct. 28, 1919, c. 85, Title III, § 5, 41 Stat. 320.)

§ 76. **Withdrawal of distilled spirits from bonded warehouses for denaturing or deposit in warehouse established under chapter.** Any distilled spirits produced and fit for beverage purposes remaining in any bonded warehouse on or before the date when the eighteenth amendment of the Constitution of the United States goes into effect, may, under regulations, be withdrawn therefrom either for denaturation at any bonded denaturing plant or for deposit in a bonded warehouse established under this chapter; and when so withdrawn, if not suitable as to proof, purity, or quality for other than beverage purposes, such distilled spirits shall be redistilled, purified, and changed in proof so as to render such spirits suitable for other purposes, and having been so treated may thereafter be denatured or sold in accordance with the provisions of this chapter.* (Oct. 28, 1919, c. 85, Title III, § 6, 41 Stat. 320.)

* It would seem that the words "this chapter," which are a transition of the words "this Act" in the original text, should be "this title" or "this chapter and chapter 2 of this title."

Notes of Decisions

1. **Sale of denatured alcohol.**—Sale of denatured alcohol in accordance with government formula has been held not violation of a state statute defining crime of being jointist. State v. Porter (Wash. 1927) 255 P. 116.

§ 77. **Operation of distillery or bonded warehouse as industrial-alcohol plant or bonded warehouse therefor.** Any distillery or bonded warehouse heretofore legally established may, upon filing application and bond and the granting of permit, be operated as an industrial-alcohol plant or bonded warehouse under the provisions of this

chapter and regulations made thereunder. (Oct. 28, 1919, c. 85, Title III, § 7, 41 Stat. 320.)

§ 78. Production, use, or sale of alcohol. Alcohol may be produced at any industrial-alcohol plant established under the provisions of this chapter, from any raw materials or by any processes suitable for the production of alcohol, and, under regulations, may be used at any industrial-alcohol plant or bonded warehouse or sold or disposed of for any lawful purpose, as in this chapter* provided. (Oct. 28, 1919, c. 85, Title III, § 8, 41 Stat. 320.)

*** See the starred note to section 76 of this title.**

§ 79. Exemption of plants and warehouses from certain laws. Industrial-alcohol plants and bonded warehouses established under the provisions of this chapter shall be exempt from the provisions of sections 37, 43, 66, 67, 202 to 205, 221, 246, 247, 257, 263, 266, 281, 282, 284, 287 to 289, 291 to 294, 298, 303 to 305, 309, 311 to 314, 318 to 320, 323, 324, 341, 361, 363 to 367, 371 to 374, 393 to 396, 398 to 401, and 407 of Title 26,* and from such other provisions of existing laws relating to distilleries and bonded warehouses as may, by regulations, be declared inapplicable to industrial-alcohol plants and bonded warehouses established under this chapter.

Regulations may be made embodying any provision of the sections above enumerated. (Oct. 28, 1919, c. 85, Title III, § 9, 41 Stat. 320.)

*** It would seem that sections 330, 368, and 397 of Title 26, Internal Revenue, which were taken from sections enumerated in the original text, should be added to the sections above enumerated. It has been suggested that R. S. § 3313 (one of the sections enumerated in the original text) was improperly omitted from Title 26. If restored in that Title, it should be added to the sections enumerated in this section.**

Historical Note

Prior to its incorporation into the Code, the first paragraph of this section read as follows: "Industrial alcohol plants and bonded warehouses established under the provisions of this title shall be exempt from the provisions of sections 3154, 3244, 3258, 3259, 3260, 3263, 3264, 3266, 3267, 3268, 3269, 3271, 3273, 3274, 3275, 3279, 3280, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3302, 3303, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, and 3327 of the Revised Statutes; sections 48 to 60, inclusive, and sections 62 and 67 of the Act of August 27, 1894 (Twenty-eighth Statutes, pages 563 to 568), and from such other provisions of existing laws relating to distilleries and bonded warehouses as may, by regulations, be declared inapplicable to industrial alcohol plants and bonded warehouses established under this Act."

Notes of Decisions

1. Acts repealed.—See, also, notes to section 52 of this title.

Under section 52 of this title expressly providing that all provisions of law that are inconsistent are repealed only to the extent of such inconsistency, and this section, recognizing the continuance of many enumerated sections relating to offenses against the internal revenue laws, and providing that they shall not apply to industrial alcohol plants, no implied repeal of such statutes was effected; the expression of one thing excluding another. U. S. v. Sohm (D. C. Mont. 1920) 265 F. 910.

Section 281 of Title 26, Internal Revenue, precribing the penalty for possession of a still not registered with the collector, and section 307 of Title 26, prescribing a penalty for making in a place other than an authorized distillery any mash fit for distillation, were not superseded by the Volstead Act (incorporated in this title), in view of section 52 of this title, and especially in view of the provisions of this section. U. S. v. De Large (D. C. Neb. 1921) 269 F. 820.

The exemption of section 293 of Title 26, Internal Revenue, from the provisions of the National Prohibition Act (incorporated in this title), so far as it relates to industrial alcohol is inconsistent with an intention to repeal it generally. Bullock v. U. S. (C. C. A. Ky. 1923) 289 F. 29.

2. Acts not applicable.—Sections 281, 303, 304, and 306 of Title 26, Internal Revenue, imposing penalties for transporting or concealing liquor on which a revenue tax has not been paid, cannot be construed as continued in force to apply to alcohol manufactured and transported for industrial purposes under the provisions of this chapter, which provides a complete system for regulating alcohol and expressly exempts plants for manufacturing same from sections 281, 303, and 304 of Title 26. U. S. v. Windham (D. C. S. C. 1920) 264 F. 370.

§ 80. Establishment of denaturing plants; sale of denatured alcohol tax free; distilled vinegar. Upon the filing of application and bond and issuance of permit denaturing plants may be established upon the premises of any industrial-alcohol plant, or elsewhere, and shall be used exclusively for the denaturation of alcohol by the admixture of such denaturing materials as shall render the alcohol, or any compound in which it is authorized to be used, unfit for use as an intoxicating beverage.

Alcohol lawfully denatured may, under regulations, be sold free of tax either for domestic use or for export.

Nothing in this chapter* shall be construed to require manufacturers of distilled vinegar to raise the proof of any alcohol used in such manufacture or to denature the same. (Oct. 28, 1919, c. 85, Title III, § 10, 41 Stat. 320.)

* See the starred note to section 76 of this title.

Notes of Decisions

1. Refusal of permits.—Commissioner has discretion in granting of permits to operate denaturing plants, and abuse of discretion held not shown, in view of evidence as to business associations of managing officers of applicant. Ma-King Products Co. v. Blair (1926) 46 S. Ct. 544, 271 U. S. 479, 70 L. Ed. 1046, affirming (C. C. A. 1925) 3 F.(2d) 936.

Refusal to approve applications for permits to operate industrial and denatured alcohol plants and bonded warehouses held not arbitrary. Chicago Grain Products Co. v. Blair (D. C. Ill. 1926) 12 F.(2d) 90.

2. Revocation or termination of permits.—Commissioner of Internal Revenue is indispensable party to suit to have declared void acts of his subordinates revoking permit to operate denaturing plant and bonded warehouse. Alcohol Warehouse Corporation v. Canfield (C. C. A. N. Y. 1926) 11 F.(2d) 214.

Under section 16 of this title, all permits, whether under chapter 2 or chapter 3, are limited; hence, after expiration of permits and refusal of renewal, permittee could not complain that hearing provided for by section 21 of this title, in case of cancellation of permit, was not had in view of this section and other sections. Chicago Grain Products Co. v. Mellon (C. C. A. Ill. 1926) 14 F.(2d) 362.

Proceeding for cancellation of permit to operate plant for denaturing alcohol was properly prosecuted under section 21 of this title. Herman Chemical Co. v. Mellon (1925) 10 F.(2d) 887, 56 App. D. C. 92.

3. Sale of denatured alcohol.—Sale of denatured alcohol in accordance with government formula held not violation of state statute defining crime of being jointist. State v. Porter (Wash. 1927) 255 P. 116.

§ 81. Withdrawal of alcohol tax free for denaturing and other enumerated purposes. Alcohol produced at any industrial-alcohol plant or stored in any bonded warehouse may, under regulations, be withdrawn tax free as provided by existing law from such plant or warehouse for transfer to any denaturing plant for denaturation, or may, under regulations, before or after denaturation, be removed from any such plant or warehouse for any lawful tax-free purpose.

Spirits of less proof than one hundred and sixty degrees may, under regulations, be deemed to be alcohol for the purpose of denaturation, under the provisions of this chapter

Alcohol may be withdrawn, under regulations, from any industrial plant or bonded warehouse tax free by the United States or any governmental agency thereof, or by the several States and Territories or any municipal subdivision thereof or by the District of Columbia, or for the use of any scientific university or college of learning, any laboratory for use exclusively in scientific research, or for use in any hospital or sanatorium.

But any person permitted to obtain alcohol tax free, except the United States and the several States and Territories and subdivisions thereof, and the District of Columbia, shall first apply for and secure a permit to purchase the same and give the bonds prescribed under chapter 2 of this title, but alcohol withdrawn for nonbeverage purposes for use of the United States and the several States, Territories and subdivisions thereof, and the District of Columbia, may be purchased and withdrawn subject only to such regulations as may be prescribed. (Oct. 28, 1919, c. 85, Title III, § 11, 41 Stat. 321.)

Notes of Decisions

1. Grant or refusal of withdrawal permits.—On presentation of permit to use specially denatured alcohol issued to plaintiff, and bond for $3,000 duly filed in pursuance of Regulations, art. 114, it became duty of collector under article 115, Regulations No. 61, to promptly approve applications so that they should become permits for withdrawal of specially denatured alcohol. Gautieri v. Sheldon (D. C. R. I. 1925) 7 F.(2d) 408.

Permittee to manufacture toilet articles, having incidental permits to use and withdraw denatured alcohol in addition to statutory manufacturing permit, was held entitled to injunction against refusal of withdrawal permits, so long as basic permit stood unrevoked. Rock v. Blair (D. C. N. Y. 1926) 13 F.(2d) 1004.

2. Offenses.—Acquittal of conspiracy to defraud United States by issuing withdrawal permits in violation of National Prohibition Act (incorporated in this title), barred second prosecution for such conspiracy by unlawfully issuing same permits, under doctrine of res judicata U. S. v. McConnell (D. C. Pa. 1926) 10 F. (2d) 977.

§ 82. Penalties. The penalties provided in this chapter shall be in addition to any penalties provided in chapter 2 of this title, unless expressly otherwise therein provided. (Oct. 28, 1919, c. 85, Title III, § 12, 41 Stat. 321.)

§ 83. Regulations for establishment, bonding, and operation of industrial-alcohol plants, denaturing plants, and bonded warehouses. The commissioner shall from time to time issue regulations respecting the establishment, bonding, and operation of industrial-alcohol plants, denaturing plants, and bonded warehouses authorized herein, and the distribution, sale, export, and use of alcohol which may be necessary, advisable, or proper, to secure the revenue, to prevent diversion of the alcohol to illegal uses, and to place the nonbeverage alcohol industry and other industries using such alcohol as a chemical raw material or for other lawful purpose upon the highest possible plane of scientific and commercial efficiency consistent with the interests of the Government, and which shall insure an ample supply of such alcohol and promote its use in scientific research and the development of fuels, dyes, and other lawful products. (Oct. 28, 1919, c. 85, Title III, § 13, 41 Stat. 321.)

Notes of Decisions

1. Regulations.—Regulation No. 60 of the Treasury Department, Bureau of Internal Revenue, regulating the quantities of Jamaica ginger that may be sold by

a retail druggist, held not to constitute a lawful justification of a licensed pharmacist's possession of 48 gallons of tincture of Jamaica ginger containing more than 90 per cent. alcohol measured by volume. Williams v. State (1922) 210 P. 315, 21 Okl. Cr. 144.

2. Violation of regulations.—Conspiracy to commit an offense against United States, within section 88 of Title 18, Criminal Code and Criminal Procedure, is pleaded when it is shown the plan was to violate department rules made to guard against liquor traffic, authority for making which is given by this section, and penalty for violating which is prescribed by section 85 of this title. U. S. v. Catrow (D. C. N. Y. 1922) 7 F.(2d) 510.

§ 84. Refund of tax on alcohol for loss, evaporation, shrinkage, or leakage. Whenever any alcohol is lost by evaporation or other shrinkage, leakage, casualty, or unavoidable cause during distillation, redistillation, denaturation, withdrawal, piping, shipment, warehousing, storage, packing, transfer, or recovery, of any such alcohol the commissioner may remit or refund any tax incurred under existing law upon such alcohol, provided he is satisfied that the alcohol has not been diverted to any illegal use: *Provided also*, That such allowance shall not be granted if the person claiming same is indemnified against such loss by a valid claim of insurance. (Oct. 28, 1919, c. 85, Title III, § 14, 41 Stat. 321.)

§ 85. Punishment for unlawful operation of industrial-alcohol plant or denaturing plant. Whoever operates an industrial-alcohol plant or a denaturing plant without complying with the provisions of this chapter and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this chapter or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. It shall be lawful for the commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation. (Oct. 28, 1919, c. 85, Title III, § 15, 41 Stat. 321.)

Notes of Decisions

1. Validity.—This section is valid under Const. Amend. 18, being reasonably adapted to enforcement of prohibition of manufacture, sale, and transportation of intoxicating liquor for beverage purposes. Selzman v. U. S. (Ohio, 1925) 45 S. Ct. 574, 268 U. S. 466, 69 L. Ed. 1054.

2. Criminal offenses.—Conspiracy to commit an offense against United States, within section 88 of Title 18, Criminal Code and Criminal Procedure, is pleaded when it is shown the plan was to violate department rules made to guard against liquor traffic, authority for making which is given by section 83 of this title, and penalty for violating which is prescribed by this section. U. S. v. Catrow (D. C. N. Y. 1922) 7 F.(2d) 510.

3. Admissibility of evidence.—In prosecution for conspiracy to violate National Prohibition Act (incorporated in this title) by purchase of alcohol from United States for industrial purposes under agreement to denature it before removal, and by removal and sale thereof without denaturing it, persons to whom alcohol was shipped, who sold it with knowledge of the conspiracy, became parties thereto, though not parties at its inception, so that evidence as to what occurred at inception of conspiracy was admissible against them. Johnson v. U. S. (C. C. A. W. Va. 1925) 5 F.(2d) 471, certiorari denied Eick v. U. S. (1925) 46 S. Ct. 101, 269 U. S. 574, 70 L. Ed. 419.

4. **Conviction affirmed.**—Conviction for conspiracy to violate section 85 of this title, and regulations as to industrial alcohol made pursuant to these sections affirmed. Selzman v. U. S. (Ohio, 1925) 45 S. Ct. 574, 268 U. S. 466, 69 L. Ed. 1054.

§ 86. Collection of tax on alcohol. Any tax payable upon alcohol under existing law may be collected either by assessment or by stamp as regulations shall provide; and if by stamp, regulations shall issue prescribing the kind of stamp to be used and the manner of affixing and canceling the same. (Oct. 28, 1919, c. 85, Title III, § 16, 41 Stat. 322.)

§ 87. Release of property seized. When any property is seized for violation of this chapter it may be released to the claimant or to any intervening party, in the discretion of the commissioner, on a bond given and approved. (Oct. 28, 1919, c. 85, Title III, § 17, 41 Stat. 322.)

§ 88. Applicability of administrative provisions of internal revenue laws. All administrative provisions of internal revenue law, including those relating to assessment, collection, abatement, and refund of taxes and penalties, and the seizure and forfeiture of property, are made applicable to this chapter in so far as they are not inconsistent with the provisions thereof. (Oct. 28, 1919, c. 85, Title III, § 18, 41 Stat. 322.)

Notes of Decisions

1. **Re-enactment of revenue laws.**—Sections 1181 and 1182 of Title 26, Internal Revenue, providing inter alia, for forfeiture of vehicles used in removal of property with intent to defraud the United States of the tax thereon, was in effect re-enacted as applied to intoxicating liquors by this section, and sections 3 and 53 of this title. U. S. v. One White One-Ton Truck (D. C. Wash. 1925) 4 F. (2d) 413.

§ 89. Repeal of laws relating to alcohol. All prior statutes relating to alcohol as defined in this chapter are hereby repealed in so far as they are inconsistent with the provisions of this chapter. (Oct. 28, 1919, c. 85, Title III, § 19, 41 Stat. 322.)

INVENTIONS

See Title 35, Patents.

INVESTIGATIONS

See Title 2, The Congress.

IRRIGATION

See Title 43, Public Lands.

ISTHMIAN CANAL

See Title 48, Territories and Insular Possessions.

JUDGES

See Title 28, Judicial Code and Judiciary.

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See Title 28, Judicial Code and Judiciary.

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